REPORT

ATTORNEY GENERAL

FOR BIENNIUM

Ending November 30, 1898.

C. J. SMYTH,

ATTORNEY GENERAL.

WOODRUFF PRINTING CO.,
LINCOLN, NEB.,
1899.

REPORT OF THE ATTORNEY GENERAL

STATE OF NEBRASKA, LEGAL DEPARTMENT,
LINCOLN, NEB., November 30, 1898.

To His Excellency Silas A. Holcomb, Governor:

SIR: In obedience to law I have the honor to hand you my report for the two years ending with November 30th, 1898. Attached hereto and as a part hereof are a uumber of schedules.

Schedule A contains a list of the opinions given by this office. From it there appears to have been 53 opinions to State officers and State boards, 127 to County Attorneys and 68 to other officers and others, making in all 248.

Schedule B contains a list of the criminal cases disposed of in the Supreme Court. The crimes involved range from petit larceny to murder in the first degree. Some of these cases deserve here a short notice.

The case of Morgan vs. State was one of special atrocity. The plaintiff in error was convicted in the District Court of Douglas County of the murder of Ida Gaskill, a beautiful little girl, aged 11 years, whom he lured into a vacant building and while there, in the perpetration of a henious crime upon her person, cruelly murdered her. The Supreme Court affirmed the judgment of the lower court, and Morgan in due time expiated his crime upon the gallows.

In Davis vs. State the jury found the defendant, Davis, guilty of murder in the second degree. One of the chief reliances of his counsel in the Supreme Court was

the unconstitutionality of Section 93 of the Criminal Code. My predecessor refused to brief the case for the reason that, in his judgment, as he stated to the Court, that the section was unconstitutional and the case should be reversed. Upon coming into office we, by direction of the Court, filed a brief in support of the judgment of the lower. That judgment was affirmed and Davis is now suffering the penalty of his crime.

Henry Bolln had been treasurer of the City of Omaha and embezzled something over $100,000 of the moneys entrusted to his care. He was convicted and sentenced to nineteen years in the penitentiary. The case was brought to this Court, where we tried it in behalf of the State. The sentence of the lower court was affirmed and Bolln is now serving out his term in the penitentiary.

B. D. Mills was a banker engaged in business in Harlan County. The treasurer of that county, E. S. Whitney, was convicted of embezzlement. Mills was arrested for aiding, abetting and assisting Whitney in the perpetration of his crime, and under the provisions of Section 124 of the Criminal Code, convicted in the District Court. Both the case of Mills and Whitney were brought to the Supreme Court and both were affirmed. Mills and Whitney are now in the penitentiary serving out their sentences. The Mills case is one of great importance, because it was the first under the provisions of Section 124 of the Criminal Code which makes the aiding, abetting or assisting a person or an officer charged with the receipt, safe keeping and disbursement of public funds embezzlement. It is ruled in that case that he who aids or assists a public officer in the misappropriation of public funds is as guilty as the officer. The effect of this decision must be very wholesome throughout the state. Prior to that decision men regarded as respectable in the com-

munity in which they lived did not hesitate to join with public officers in the use of public funds which was not in accordance with law. This decision teaches all such that they are violators of the law and consequently it will have the effect, in my judgment, of causing bankers and others to be extremely careful with respect to their participation with public officials in the use of public funds.

There were a number of cases brought to the Supreme Court in which was involved the law making cattle stealing a crime without reference to the value of the property stolen. A most vigorous effort was made to have this law declared unconstitutional, but in each case the State was successful and cattle stealing in the great stock raising sections has ceased to be as prevalent as it was.

The case of the State vs. Joseph S. Bartley was commenced in Douglas County on a complaint filed by me on the 27th day of April, 1897, charging him with the embezzlement of $201,884.05 of the State's money. He was bound over to the District Court and early in June, 1897, his trial in that court was commenced, in which trial I participated by request of your excellency. On the 26th day of June he was convicted and afterwards was sentenced to twenty years in the penitentiary. June 27th, 1897, he filed a petition in error in the Supreme Court and the case was argued and submitted on the 22nd day of December, 1897. January 3d, 1898, the Supreme Court handed down its opinion affirming the judgment of the lower court. On the 17th of March, 1898, a rehearing was granted; May 20th the case was re-argued and submitted, and the Supreme Court again affirmed the decision of the lower court. On the 9th day of July,

1898, Bartley entered the penitentiary, where he is now serving his sentence of twenty years.

On my complaint Eugene Moore, ex-Auditor of Public Accounts, was arrested on the 24th day of February, 1897, on the charge of embezzling $23,218 the property of the State. He waived examination and was bound over to the District Court of Lancaster County. An information against him was duly filed. To this information he filed a demurrer, the principal point of which was that the law, Section 30, Chapter 42, under which he collected the moneys which were embezzled by him had been repealed by the constitution of 1875; that he had no authority to collect State funds, and therefore that the moneys which he did collect and which he embezzled were not the property of the State. This question was elaborately argued before his honor, Judge Hall, and after careful consideration that Judge overruled the demurrer and ordered the defendant to plead to the information. In due course of court procedure Moore appeared for trial bfore Judge Cornish of the same court. He entered a plea of guilty and shortly thereafter filed a motion in arrest of judgment. This motion was based on substantially the same ground as his demurrer to the information. Carefully and thoroughly the question involved was argued, Judge Cornish took the matter under advisement, and some two weeks after the submission rendered his opinion, in which he overruled the motion and sentenced Moore to eight years in the penitentiary. The case was taken to the Supreme Court by proceedings in error and the majority of that court, consisting of Mr. Chief Justice Harrison and Judge Norval, reversed the decision of the lower court and dismissed the proceedings on the ground that the section was inconsistent with Section 24, Article 5, of the constitution of 1875 and

therefore had been repealed by the adoption of the constitution. I filed a motion for a rehearing, supported by a brief, in accordance with the rules of the court. The motion was overruled and thus ended the case.

The case of Edward Lorenz vs. State is one in which we refused to file a brief and stated orally to the Court that, in our judgment, the case should be reversed. This we did, although there appeared to be no legal ground why the sentence of the lower court should not be affirmed. Lorenz was arrested on a charge of murder in the first degree. He was about 18 years of age when the crime was committed. During the trial of the case his counsel failed to take any exceptions to the rulings of the court, and after the verdict of guilty was returned by the jury he failed to file a motion for a new trial within the time fixed by statute. The jury found Lorenz guilty of murder in the first degree, fixing the penalty at imprisonment in the penitentiary for life, to which the court in due time sentenced him. An examination of the record failed to satisfy me that there was any proof whatever to sustain the verdict and that, coupled with the defense which the young man received, satisfied me beyond the possibility of a doubt that justice required a new trial should be granted to him. I so stated to the court, it examined the record, took my view of the matter and sent the case back for a new trial. Since that the case has been tried and the young man acquitted.

Reynolds vs. State was a case in which the plaintiff in error was convicted of receiving stolen goods. This case was reversed on the ground that Section 116 of the Criminal Code was unconstitutional, the ground of the unconstitutionality being that the act of 1875, of which the section was a part, was amendatory of a prior statute and did not comply with Section 9, Article 2, of the con-

stitution of 1866. This act contained 41 sections, all of which fell with Section 116, and thus were stricken from the Criminal Code Sections 8, fighting by agreement; 17, assault and battery; 25, carrying concealed weapons; 26, unlawful assembly; 28, riot; 30, resisting and abusing officers; 44, providing penalties; 65, killing and injuring animals; 75, disease among sheep; 76, selling diseased animals; 78, taking and using animals without leave; 87, interfering with private fish pond; 89, injuring trees; 90, injuring trees on public grounds; 91, destroying trees; 116, receiving stolen goods; 119, petit larceny; 120, concealing stolen property; 121, embezzlement; 125, obtaining money, etc., by false pretenses; 139, penalties; 140, adulterating liquors; 208, adultery; 213, directions to grand jury; 214, gaming; 215, keeping gaming tables; 216, gaming on private premises; 217, gaming at public houses; 218, keeping gambling room; 219, being a common gambler; 220, enticing minor to gamble; 223, betting on elections; 226, advertising lottery; 233, fishing at certain seasons; 242, vagrants; 262, judicial officers, conservators of the peace; 271, recognizances of witnesses; 377, custody of prisoners; 401, witness before grand jury; 465, separate trial; 522, imprisonment at hard labor by magistrate.

Schedules C, D, etc., show the civil cases which have been conducted during the biennium. A word with regard to some of them. My predecessor commenced in the Federal court the case of Bartley vs. Hayden, as receiver of the Capital National Bank, to recover $236,000 of the State's money on deposit therein when the bank failed. The court held on demurrer that the action should have been commenced in the name of the State, but gave me leave to substitute the State. Many other questions of law were raised from time to time by the defense, but all have been resolved in favor of the State,

and judgment will be entered for the State when the case is reached in the January term.

The case of the State vs. Bartley and his sureties for $555,790 was commenced in Douglas County in March, 1897. The trial came on in October, 1897, and lasted for five weeks. At the opening of the trial the bond was offered in evidence and admitted over the objection of the defense. At the close of the trial five weeks afterwards the defense renewed its objection to the bond and the court sustained the objection on the ground that the bond had not been approved in time. To prevent the Court from instructing the jury to return a verdict against the State I dismissed without prejudice, and the next day commenced a new action. This action was set for trial February 1, 1898. In the meantime the Supreme Court discovered there was in a case which had been submitted to it the precise question which the District Court of Douglas County had ruled against the State, viz: Whether the failure to approve an official bond in the time fixed by statute rendered the bond void, and I was requested by the Supreme Court to argue that question in that case. This I did; the Court sustained the State's position, and in effect overruled the District Court of Douglas County. Consequently when the next trial of the bond case came on the District Court held the bond good, but, although there was no dispute whatever of fact as to more than $220,000 and, in my judgment, no dispute as to the balance of the amount sued for, the Court refused to so instruct the jury, and that body returned a verdict for the defendants. I promptly took the case to the Supreme Court on error. It has been argued and submitted and a decision is expected soon. *

The decision in the case against ex-Auditor Moore and his sureties followed the decision in the criminal

case. In the latter case it was held that, as before stated, the moneys received by him were not received by virtue of his office, and hence in the civil case his sureties were not liable. Judgment was, however, entered against him for $23,218.

The maximum freight rate cases when I came into office were on the docket of the Supreme Court of the United States for re-argument, but the date for the argument had not been set. A few weeks after my inauguration I went to Washington and had the argument set for the 5th day of April. At that time I again went to Washington to participate in the argument, but in no way interfered with John L. Webster, Esq., in his management of the case for the reason that the course of the case had been framed by him under employment by the State long before I entered the office. The case was decided against the State. Then, Mr. Webster's employment having come to an end, I took charge and secured from the Court a very important modification of the decrees—a modification by which the right of the State to regulate railroad rates lost by the decrees was restored. (See Supreme Court Reporter, vol. 18, page 888.

The case against the Society of the Home for the Friendless in an action in ejectment to determine whether the property occupied by the Home for the Friendless belongs to the State or to the society, a verdict has been returned in favor of the State and the case is now in the hands of the Court on a motion for a new trial.

Action was brought to recover from the receiver of the Exchange Bank of Atkinson $55,000, which was on deposit in that bank to the credit of ex-Treasurer Bartley. Judgment was rendered and $6,762.30 paid thereon. About $2,000 more will be realized.

I discovered that ex-Treasurer Bartley had on deposit $8,000 in the Citizens' National Bank of Grand Island. Action was brought and judgment secured, on which $907 have been paid. More will be recovered, but how much I cannot say.

Judgment was recovered in the case of the State vs. The Buffalo County National Bank and its sureties on a depository bond for the sum of $5,777.68. The case has been appealed.

Having learned that ex-Treasurer Bartley held as collateral for State money on deposit in the Lincoln Savings Bank certain warrants issued by the school district and city of Hot Springs, South Dakota, in the sum of $4,200, I caused suit to be brought in South Dakota to prevent the payment of those warrants to Bartley and to compel their payment to the State, which suit is pending, but will be shortly determined.

The case of the State vs. The First National Bank of Alma, et al., for $40,000 on a depository bond was commenced and is set for trial January 10, 1899, in the District Court of Harlan County.

The case of the State vs. The First National Bank of Orleans et al, is also an action on a depository bond for $20,000 in the United States Circuit Court. It will be tried at the January term.

Simpson vs. The Union Stock Yards is an action in the United States Circuit Court to restrain the State from enforcing the law fixing the rates to be charged by the Yards. A temporary injunction has been granted and some of the testimony has been taken. The case will probably be disposed of at the January term.

The two cases against the Merchants' Bank et al are cases in the Lancaster County District Court on deposi-

tory bonds for $8,731.85. One of the cases has been set for the first day of the February term.

The State has sued the Omaha National Bank in the District Court of Douglas County to recover $201,884.05, embezzled by Bartley and by him delivered to that bank in violation of law. The suit is on the theory that the bank knowingly participated in Bartley's conversion of the money.

A number of insurance companies commenced in the United States Circuit Court the case of the Niagara Fire Insurance Company vs. Cornell et al., to prevent the enforcement of what is known as the anti-compact or anti-trust law. A restraining order was granted. The application for a temporary injunction was argued and submitted last February, but has not yet been decided.

Complaints were filed with the State Board of Transportation against the telephone, express and telegraph companies. Pending the hearing on the complaints the companies in the case of the Pacific Express Company vs. Cornell et al, secured from the District Court of Lancaster County a temporary injunction against the board restraining it from proceeding to hear the complaints on the theory that the law under which the board was acting was unconstitutional. I demurred to the petitions and the Court sustained the demurrer, upheld the law and entered judgment against the companies. The cases have been appealed and are now pending in the Supreme Court.

The State vs. Ebright et al.; the State vs. Mallalieu et al, and the State vs. Gillispie are all cases to recover money due the State.

Dr. Armstrong, ex-Superintendent of the Institute for Feeble Minded Youth, was when he retired from office short about $2,600. The matter was placed in my

hands for action. After some months of correspondence he settled the entire amount due.

Some weeks after it was discovered that Eugene Moore was in default I learned that he had on deposit $2,500 in the Columbia National Bank of this city. I thereupon notified the bank not to pay it to Moore. He demanded, but the bank refusing to pay, he finally made a check therefor to the State Treasurer and the amount was thereafter covered into the treasury.

The case against L. F. Hilton, ex-Oil Inspector, and his sureties was once tried by my predecessor in the District Court of Lancaster County, which trial resulted in a disagreement of the jury. I tried the case during the present year and recovered a judgment against Hilton and his bondsmen for the full amount of the shortage, $6,941.68. The defendants have taken the case on error to the Supreme Court, where it is now pending.

The case of Thomas P. Kennard against the State is based on an old claim of Kennard against the State for commissions alleged to be due from the State on account of the collection of certain moneys from the United States on account of the sale of public lands within this State. This claim was by the Legislature of 1897 referred to the courts for adjudication. The case was tried in the District Court of Lancaster county and a judgment secured against the State for $13,521.99. The State brought the case by proceedings in error to the Supreme Court, where it was thoroughly briefed, argued and submitted, and the judgment of the lower court reversed.

THE FIVE THOUSAND DOLLARS APPROPRIATION.

The last Legislature appropriated $5,000 for the purpose of "for use in prosecutions by the Attorney General in cases civil and criminal which he may undertake on behalf of the State." Warrants could not be drawn against

this appropriation except upon vouchers approved by the Governor and Attorney General. Not a dollar was drawn except what was necessary to protect the interests of the State. Schedule H shows in detail the use made of the appropriation. Among the items of expenditures there appear five items charged to me. These items are: July 26, 1897, $90, paid to G. W. Blake for work as detective in jury cases to which the State was a party. July 30, 1897, expenses to O'Neill in State vs. Bartley and Exchange Bank of Atkinson matters. December 7, 1897, $10 paid to James Malone, detective, for services rendered the State in the case of State vs. Bartley et al. June 6, 1898, $44.40, being for stenographic assistance and witness fees and expenses disbursed during the trial of the Bartley case at Omaha. The item of August 23, 1898, $200, represents the amount deposited with the Clerk of the Circuit Court of the United States at Omaha in lieu of an appeal bond in the case of Meserve vs. Hayden, receiver.

Part of this appropriation was used to pay experts who examined the records of the Treasurer's, Auditor's and other State officers in preparing for the trials of the criminal cases against ex-Treasurer Bartley and ex-Auditor Moore. Some was in connection with the civil cases against the sureties on the bonds of Bartley, Moore, ex-Oil Inspector Hilton and others; some used in connection with suits on depository bonds, etc. Without this appropriation the State would have been at a great disadvantage in the trial of nearly all of its cases in the lower courts. Those whom the State was and will be again compelled to combat in these cases have generally at their command all the money which their needs demand. The State should be in the same position. If witnesses from abroad are required there should be money to pay

their traveling expenses and fees. If the record of the testimony in a long trial should be had from day to day there ought to be money at the command of counsel for the State to pay for it. If detectives are necessary to prevent interested parties from thwarting justice by interfering with juries impaneled to try State cases, money to pay for their services should be at the disposal of the State's representatives. In the criminal case against Bartley an effort was made to bribe the jury in the interest of the defendant. Whether the effort would have succeeded I, of course, do not know positively, but I believe it would have had not the detectives employed by the State discovered it and brought the bribe offerer to speedy justice. Many very important cases involving nearly a million of dollars still remain to be tried. Nothing should be done to cripple the State in its conduct of these cases, and I do not anticipate that there will. Consequently the forthcoming Legislature should, in my judgment, be requested by your Excellency to appropriate the same sum as was appropriated by the last Legislature "for the use of the Attorney General in the prosecution of civil and criminal cases to which the State is a party."

DEFECTS IN THE LAWS.

Attention has been called to the law providing for the punishment of cattle stealing and the attacks that have been made upon its constitutionality. That the attacks have not been successful is due to the time and manner in which they were made rather than to the absence of the defect relied on. The defect lies in the failure of both houses of the Legislature to pass the bill certified to by the presiding officer of each house and approved by the Governor. If, therefore, the Legislature desires this law to withstand all future attack it should be re-enacted.

The law prescribing in part the duties of the Attorney General declares among other things that "he must prosecute and defend all cases in the Supreme Court," etc. Just how he can prosecute and defend all cases to which the state is a party is not quite clear—it is unintelligible. The infirmity should be removed. It is also provided that when requested by either branch of the Legislature or the Governor he shall appear in the District Courts and prosecute and defend all cases in which the State is a party or interested. The law governing county attorneys also provides that they shall appear in all State cases, both civil and criminal. When the Attorney General appears in the District Court in obedience to the law referred to, what shall be his status? Is he to be in charge of the case or is he to be subordinate to the County Attorney? The present incumbent of the Attorney General's office has experienced no difficulty whatever in his relations with county attorneys in such cases, still the room for difficulty is there and should, in my opinion, be removed.

There is much doubt with respect to the question Who is empowered to let the contract for printing the reports of the Supreme Court—the Clerk of the Court or the Printing Board? This doubt, which has led to litigation, should be removed.

Section 30 of Chapter 42 is the one under which Eugene Moore and other State officers have heretofore claimed the right to collect the fees earned by their respective offices. The provisions of the section which seems to authorize such collections should be repealed and the remaining parts be re-enacted, for they are necessary, inasmuch as they fix the fee to be paid the State for certain services to be performed for insurance companies by the State.

When dealing with some of the important criminal cases tried I ascertained the fact that the Supreme Court, in the case of Reynolds vs. The State, held some forty sections of the Criminal Code unconstitutional. It is important that these sections be re-enacted.

By the constitution the Attorney General is required to serve on two boards—the Board of Public Lands and Buildings and the Board of Educational Lands and Funds—and by statute law he is a member of eight other boards. If he gave to the work of each board all the time that should be given he would have little left for the work of his office. The boards created by the constitution cannot, of course, be changed by the legislature, but the boards created by statute can be, and in my judgment, should be changed. The training of an Attorney General is not along lines which fit him for service on any of these boards. Take for illustration the Board of Purchase and Supplies. This board, as the name implies, purchases all the supplies required by the State institutions. Often has he been called out of the Supreme Court or from the study of some intricate case to go down stairs and attend a meeting of the board when the chief question was whether the steward of some institution should be permitted to purchase a few pounds of prunes or a box of soap; that the Attorney General knew nothing about the price of prunes or soap and that the steward was thoroughly familiar with both made no difference. The Attorney General must neglect work with which he is familiar to take up work with which he has no familiarity. What is true of his membership in the Board of Purchase and Supplies is also true of his membership in other boards. What does he know about railroad rates and the management in general of railroads? Little, if any. Yet he is a member of the Board of Transportation.

His membership in the Board of Health presents similar considerations. Posted up in stores and offices in the State are certificates in which it is stated that, in the judgment of the Attorney General and other executive state officers, a person therein named is qualified to practice pharmacy or medicine or dentistry, as the case may be. The Attorney General knows but little of the learning of either of these professions—certainly not enough to enable him to pass with justice on the fitness of an applicant for admission therein. Yet not one can practice any of these professions without incurring a heavy penalty unless he has such a certificate. Everyone knows, who knows anything at all about the matter, that the judgment of the Attorney General, and I may venture to say, every member of the board, as to the fitness of an applicant for admission to the practice of any of those professions is controlled entirely by the secretaries provided for by law. Why, then, should his name be required on the certificates? Simply and solely for the purpose of evading what is thought to be a prohibition of the constitution against the creation of additional executive State officers. If the constitution contains such a prohibiion no attempt should be made to evade it—it should be respected. If the State does not respect its own constitution, who shall? Let us change it if it does not suit, but while it exists, obey its every word and line in spirit as well as in express command. But does the constitution prohibit the creation of such boards as the Board of Health, Transportation and Purchase and Supplies? The Supreme Court, in an answer to a question propounded by the Legislature many years ago, said it did. That answer was formed without the aid of argument at the bar or through briefs, and did not, I am informed, receive that consideration which the Court is

accustomed to give to a constitutional question. Whether the Court could, after these many years of legislative adhesion to the rule embodied in that answer, or, indeed, to recede from it, I, of course, do not know, but I do know it would be worth while to make the attempt to induce it to do so. There is now pending in the Court a case in which the answer just referred to is vigorously attacked, and the constitutionality of the law creating the secretaries of the Board of Transportation is strongly assailed on the ground that it is but an evasion of the constitution —an attempt to do by indirection what cannot be done directly. This case will require the Supreme Court to reexamine that answer and decide again whether it announced a correct interpretation of the constitution. The decision in that case, in the ordinary course of practice, may or may not be reached in time to be of value to the forthcoming Legislature, and the point I am now discussing may or may not be decided, although in the case. Therefore I would suggest that the Legislature, if it desires to change the law on the subject under consideration, make its desire known to the Court, and in that event I have no doubt the Court would not only dispose of the point in question, but would do so in time to enable the Legislature to take such action in the premises as it may think proper.

If the Court should change its former holding and decide that the Legislature could provide, either by appointment or election, for boards independent of the executive State officers mentioned in the constitution, the work of the State could be done by fewer boards at less expense and better than it can be done under the present system, and above and beyond all this would be the act that the State would cease to occupy the attitude of

daily evading, if not openly violating, its own constitution.

REVISION OF OUR LAWS.

As intimately connected with the subject which I have just been discussing, permit me to suggest that the entire body of our statutory law needs revision. It is now more than twenty-five years since the last revision. During these years Legislature after Legislature has added to the whole its share of "ill shapen," loosely drawn, contradictory, vague and unintelligible laws. Among the natural results are great uncertainty as to what is the law, increased litigation and a body of statutes unworthy of the advanced intelligence of our people. It took twenty-three years to learn that the statute under which the Auditor supposed he was entitled to collect the fees of his office, was repealed by the constitution of 1875. Nearly the same length of time was necessary to discover the invalidity of the forty-two sections of our Criminal Code, to which reference has heretofore been made in this report. What other laws are equally defective we cannot know until the test comes. How many of the statutes of the State would stand the test of whether or not the journals of each house showed that they had passed both houses? Yet if the journals fail to show that fact with respect to any particular statute, the statute is bad under the decisions of the Supreme Court, the last one of which was rendered but a short time ago; not only that, but whether it has so passed is, the court holds, a question of fact to be passed on by the jury in each case. In every criminal trial the jury may be called upon to say whether the law under which the defendant is being tried passed both houses. How important, then, is it that the history of each law on the statute books, but especially of the criminal law, should be definite. All

these considerations and many more may be urged in favor of a revision. Nor should it be imagined that it is a simple task to form out of the mass enactments called our Compiled Statutes a clear and symmetrical body of laws. The work would be one of great difficulty, and should, in my judgment, be trusted only to a commission of learned, able and experienced men. A cheap commission would be worse than none. If good men are to be procured, good salaries must be paid.

Hon. Ed. P. Smith has resigned as Deputy Attorney General and I have appointed in his stead Hon. Willis D. Oldham of Kearney.

CONCLUSION.

The number of cases of magnitude which this office has had charge of in behalf of the State during the biennium just completed is larger than the number of all the cases of like character which has been in the office during all the time prior thereto. Great were the difficulties which we had to encounter. Wealth, social status, commercial power, political prestige, all contributed their share to shield those whom the law sought to punish, or to coerce into performing their obligations. The Attorney General was subjected, first, to cajolery, then to threats, and finally to villification for the purpose of weakening him in his efforts to vindicate the law and enforce its commands. At no time have I found any pleasure in the thought that my endeavors to compel obedience to the law would result in sending some men to the penitentiary, or in taking from others the earnings of their better years. My chief purpose has been, and will be during my next term, to bring about a firm belief in the minds of all that the law is as imperative when dealing with the man of wealth and station as when dealing

with the man of poverty and obscurity. In that belief rests the security of every man's person and property.

To whatever has been accomplished through this office, much has been contributed by the ability and energy of Hon. Ed. P. Smith as Deputy Attorney General, nor can I in justice overlook the efficient services rendered by George F. Corcoran, Esq., who, although employed as a stenographer, is a member of the bar, and as such has on many occasions rendered valuable services to the State.

To your Excellency I am under obligations for the uniform courtesy with which you have always treated me in our official relations, and it is my cordial wish that upon your retirement from your present high position, you may enter paths which shall lead to happiness and well earned honors. Respectfully submitted,

C. J. SMYTH,
Attorney General.

December 1, 1898.

*The case of the State vs. Bartley and his sureties was reversed by the Supreme Court December 8, 1898.

SCHEDULE A.

January 12, 1897.

Hon. H. D. Carey, Seward, Neb.

My Dear Sir: Your favor of January 8th received, making inquiry as follows: Has the County Board the right to allow the County Clerk $1,700 per annum for clerk hire, when, in fact, it does not cost the County Clerk more than $1,000 per annum?

You are advised that the statute fixes the salary which the county clerk can receive and it would clearly be illegal for him to appropriate to himself $700 of the amount appropriated for clerk hire. If it only costs $1,000 for clerk hire, then the board would have no right

to appropriate $1,700. This is certainly elementary. Very truly yours,

ED. P. SMITH,
Deputy Attorney General.

January 12, 1898.

Hon. Guy Laverty, County Attorney, Burwell, Neb.

My Dear Sir: Your favor of January 8th is received, making inquiry in substance as follows:

Where the County Commissioners have levied a tax of 15 mills have they authority in addition thereto to levy a 2 mill tax for the purpose of paying judgments rendered against the county prior to the levy?

Section 75 of the Revenue Law of this State provides the amount of tax that may be levied for general State purposes. Section 77 provides the amount which may be levied for general county purposes, and this section expressly provides that "the rate of tax for county purposes shall not exceed $1.50 on the $100 valuation, except for the payment of indebtedness existing at the adoption of the present constitution, unless authorized by vote of the people of the county, etc." Under this section it would seem to be clear that the county board has no authority to levy taxes in excess of 15 mills. If they have attempted so to do, I am of the opinion that the excess would be illegal and could not be collected. Your attention is called to the case of the Railroad vs. York County, 7 Neb. 487. You will see that our Supreme Court there announces the rule that the power to levy taxes must be strictly construed, and that the county board has no authority to levy taxes unless that authority is expressly conferred upon them by statute. Section 77, to which your attention has been called, places a limit upon the amount which the County Board can

levy for general county purposes. Any levy in excess of this amount would clearly be illegal.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

January 12, 1897.

Hon. J. V. Wolfe, Commissioner of Public Lands and Buildings, Lincoln, Neb.

My Dear Sir: Yours of the 8th asking for the opinion of this office upon the bond presented by B. R. B. Weber for your approval is at hand.

Without making an exhaustive examination of the question it is my opinion that Mr. Weber's bond had better be dated and presented after his appointment.

Very truly yours,
C. J. SMYTH,
Attorney General.

January 13, 1897.

R. A. Greene, Esq., County Clerk, McCook, Neb.

My Dear Sir: Your favor of January 12th has been referred to me for answer. You ask for an opinion upon the following proposition: Have County Commissioners any right and is it lawful for them to audit and allow claims against the county on any fund after the 85 per cent limit is reached, there being no money in such fund for the payment of such claims?

Section 2115 of the Compiled Statutes provides that: "It shall be unlawful for the County Board to issue any warrants for any amount exceeding 85 per cent of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same. It also provides that it shall

be unlawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, and also forbids the county board to make any contracts for or to incur any indebtedness against the county in excess of the tax levied for county expenses during the current year.

I understand your inquiry to be whether or not the County Commissioners have a right to audit and allow existing claims against the county. I do not understand that it is contemplated that the county board is to incur new indebtedness. I understand that those claims already exist against the county, and the only question is whether the county board can audit and allow them. Under this Section 2115 the county board has no right to issue any warrant or warrants in payment of claims exceeding the aggregate of 85 per cent of the amount of tax levied, unless the money is in the treasury, but I do not understand that this section prevents the county board from auditing and allowing legal claims already in existence against the county. To audit and allow a claim is not incurring an indebtedness or making any contract, nor is it issuing any certificate of indebtedness in any form whatever. It is simply an official recognition on the part of the county board of the validity of the claim. I do not understand that this section makes it unlawful for the county board to officially recognize the validity of an existing claim against the county. The object of this section is to prevent warrants from being issued when there is nothing on hand with which to pay the same, or a likelihood that the money will be on hand in the near future, and it also prevents them from incurring an indebtedness beyond the amount of tax levied for expenses during the current year. I understand that this indebtedness has already been incurred and that no de-

fense is made to the claim, and the question is after the 85 per cent limit has been reached and there is no money on hand, can the county board then audit and allow these claims? It is my opinion the board can lawfully audit and allow these claims. Your attention is called to the case of the State ex rel Wessel vs. Weir, 33 Neb. 35. I think the principle announced by the Court in that case is applicable to your case.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

January 13, 1897.

Hon. W. R. Jackson, State Superintendent of Public Instruction.

My Dear Sir: My opinion has been asked relative to the matters contained in the letter of Hon. D. D. Martindale, Superintendent of Public Instruction of Knox county. It appears from his letter that District No. 92 divided. This district had no property prior to the division, but had an indebtedness of $140.42, not bonded. The question is, how shall this debt be apportioned between the two districts? Section 9, (4648) of the school laws of this state provides that when a new district is formed in whole or in part from one or more districts, the property of the old districts shall be divided between the two as nearly as practicable according to the relative taxable property in the respective parts of such former district at the time of the division. It further provides that if there be a bonded indebtedness, then the new district shall be liable for the indebtedness to the same extent as if the new district had not been formed. In other words it gives the new district its share of the property based on the relative value of the taxable property, and

it is also held liable for its share of the bonded indebtedness, based, of course, upon the same relative value of the taxable property. Section 16, (4655), provides that when a new district is formed from the territory of a former district, and there shall be any indebtedness which has not been bonded, then such unbonded indebtedness shall be taken into account in estimating the sum due from the old district to the new district, on account of school house or other property. It further provides that this new district shall be entitled only to the value of its proportionate share of such property, after deducting its like share of such indebtedness. In determining the share of property which it should receive, and the amount of debt which it should assume, I think reference must be had to the value of the taxable property in the respective parts of the former district.

In the case referred to by Mr. Martindale, it seems there is no property to divide, but the only question is, as to the amount of this debt which each district must assume. If the taxable property in the new district is one half that of the old district prior to the division, then it would be entitled to one half the property and would be compelled to assume half of the debts. The fact, that there is no property would not, I think, change this rule. The new district would be compelled to assume that portion of the old debt which the taxable property in the new bears to the taxable property in the old district prior to the division. I find nothing in the statute which contemplates a division of this debt based on the number of school children in each district, or according to the actual days attendance by the pupils in the new and old districts. The statute clearly contemplates that the division shall be made according to the relative value

of the taxable property in the respective parts of the former district.

Very truly yours,
C. J. SMYTH,
Deputy Attorney General.

January 15, 1897.

J. M. Day, Esq., County Attorney of Hamilton County, Aurora, Neb.

My Dear Sir: I have your favor of the 13th inst. making certain inquiries with reference to the payment out of the county treasury of one half the moneys paid into the treasury for the Road districts to the Road Overseers. You say, "I presume he draws it and gives a receipt, without a warrant." Your presumption is, I think, correct. The law specifically provides that the treasurer shall pay out one half the money raised to the Road Overseer. This being so, it is for the treasurer to determine who is the Road Overseer, and that being settled, he is then authorized to pay the money directly to him and take his receipt therefor.

Very truly yours,
C. J. SMYTH,
Attorney General.

January 15, 1897.

O. H. Nichols, Esq., Deweese, Neb.

My Dear Sir: I have your leter of the 9th propounding certain questions to which you will find answers below:

The cattle not having been delivered until the middle of April no title passed until they were delivered, hence, under section 6, article 1, of chapter 77, of the Revenue law they should have been assessed in the name of "A," for the title to them was in "A" on the first of April.

2. If an error was made in the assessment, application should be made to the County Board for relief.

Any further questions arising out of this transaction should be addressed to your County Attorney. It is his duty to advise in all such matters. If, however, he should desire the opinion of this office we would be glad to furnish it to him, but until he expresses that desire to us the courtesies existing between his office and ours require that all such questions as the above should be addressed to him.

Very truly yours,
C. J. SMYTH,
Attorney General.

January 20, 1897.

J. H. Lincoln, Esq., Stockville, Neb.

My Dear Sir: Your favor of January 14th addressed to the Attorney General has been handed to me with the request that I answer the same. Your inquiry as to whether or not the county is liable for livery hire engaged by the County Attorney while investigating and prosecuting criminal cases and defending cases brought against the county. You are advised that it is the opinion of this office that the matter of allowing a sum to the County Attorney to cover these expenses is wholly discretionary on the part of the County Board. If the bill were filed with the County Board for expenses necessarily incurred and actually paid, the county board might in its discretion allow and pay the same. We do not think that the liability exists to the extent that a suit could be maintained against the county if the board should refuse to audit and allow the same.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

January 20, 1897.

George C. Gillan, Esq., Lexington, Neb.

My Dear Sir: Your favor of January 16th addressed to the Attorney General has been given me for attention. Your first inquiry is in substance whether a member of the county board can lawfully furnish supplies of any kind to the county while he is acting as a member of the board. Our statute is very plain on this matter and ab- tion as to whether or not the prices are reasonable or un- solutely prohibits such transactions. It is not a ques- reasonable, for such deals are absolutely prohibited.

Your second inquiry as to whether or not a party residing in the vilage of G is disqualified from acting as road overseer when, as you say, 'is in the limits of said road district.' If this latter statement in your letter be true, then it is difficult to conceive of any reason why the party referred to would be disqualified from holding this office. If he resides within the district that ought to be sufficient so far as residence is concerned.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

January 21, 1897.

L. M. Moulton, Taylor, Neb.

My Dear Sir: Your favor of January 8th addressed to the Attorney General asking for his opinion upon sev- eral propositions has been referred to me for answer. Though your letter does not so state, I infer that this road bed to which you refer has not been used since the grade was completed. By that I mean that the track was never laid and trains are not operated over the same. If it is used in the operation of a line of railway then the as- sessment, as you no doubt understand, is made by the

State authorities. If, however, the railway company has simply secured a deed for the right of way and have graded the same and have done nothing further than this, then it is no doubt the right and privilege of your precinct assessor to assess this property. I think, however, that it should be assessed as real estate and not as personal property. I cannot see how there is much room for a difference of opinion on this proposition. All the railway company has there is a certain tract of land. If the assessment against the railway company has been for personal property, when, as a matter of fact, the railway company has no personal property in the county, then it must be plain that the tax is illegal. If the tax were assessed against a private individual who was a non resident of your county on account of personal property, when in fact he had no personal property in your county, it would occur to any lawyer that this tax would be unwarranted and illegal. Our statute provides that where a tax on personal property is not paid a distress warrant may issue and the personal property of the delinquent may be attached and sold thereunder, but it would be hardly possible to sell the right of way of this company as personal property. Hence it must necessarily follow that the taxes assessed against this property as personal property is illegal. The question thus presented is what remedy has your county at this time? If you will turn to section 71 of chapter 77, (page 899) Compiled Statutes of Nebraska for 1895, you will see that the Legislature has provided for just such emergencies. In your case this real property has escaped taxation for two or three years. This section provides that it shall be the duty of the county board when sitting as a board of equalization in any subsequent year to assess said property at the

proper valuation for the year or years which said tax should have been levied thereon and to levy thereon upon such assessment at the time of levying other taaxes in such subsequent year at the same rate of state, county, township, school district, city, village and other levied taxes as might legally have been levied thereon in the years in which it shall have escaped taxation, which tax and the levy thereon shall be in addition to all current and all other taxes on the same property for each subsequent year and be as valid for all other purposes as though properly assessed and levied in the year in which such land so escaped taxation. I think your county board ought to pursue the remedy outlined in that section. I would not advise that they make an order cancelling the personal taxes standing against the company, but to allow the same to remain until this new levy has been made and the tax provided for therein have been paid; then the present tax standing against the company might be cancelled.

I trust this gives you the desired information and that you may be able to get matters straightened out.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

January 21, 1897.

L. M. Moulton, Esq., Taylor, Neb.

My Dear Sir: Your favor of January 8th has been received, relative to recovering upon the bonds of certain defaulting county clerks of your county who failed to keep up their books in proper shape. There would seem to be no question but that the bondsmen of these clerks would be liable for the amount which the county had to expend in order to bring these books up in proper shape.

If you will refer to page 1266 of the Compiled Statutes of 1895 you will see that it is therein expressly provided that Justices of the Peace have no jurisdiction in an action against officers for misconduct in office. Your attention is also called to Crow vs. Bowlan, 19 Neb., 528, wherein our Supreme Court held that the county court had no jurisdiction to hear and determine actions brought against officers for penalties imposed by section 34, chapter 28 Compiled Statutes of 1885. This would seem conclusive upon that point. You further make inquiry as to which bondsmen would be liable. That would depend wholly upon the time when the defalcation or failure of duty on the part of the county clerk took place. For instance, if your county was compelled to pay out this money to do work which the county clerk ought to have done in 1880, then the county clerk's bondsmen in 1880 would be the ones and the only ones against whom an action could be maintained. No bondsmen would be held liable for the failure of the county clerk to do his duty some time other than that covered by the bond of which he was a signer. The last bondsmen to whom you refer would not be liable if the failure on the part of the official took place before the last bondsmen signed the bond. I trust I have made this clear.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

January 21, 1897.

Senator Edward E. Howell, Senate Chamber.

My Dear Sir: My opinion has been asked touching a proposed bill which seeks to limit the number of agents which an insurance company authorized to do business in this state may appoint in any village, town or city and

for other purposes. Section 1 of this proposed bill prohibits the Auditor of Public Accounts from issuing a license or authority to write policies of fire insurance or to solicit, obtain, or transact fire insurance business to more than one agent, firm, person or corporation in any vilage, town or city in the state.

Section 3 provides a penalty for violation of the pro- to appoint more than one agent and also makes it unlawful under certain conditions for any agent to solicit invisions of the act and makes it unlawful for any company surance.

I have no hesitancy in saying that this bill if it became a law would be unconstitutional. There is no more reason why insurance companies should be limited in the number of agents and solicitors they may employ than there would be in limiting the number of clerks a merchant should employ. I am satisfied the Court would refuse to enforce such provisions as are found in this proposed bill.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

January 21, 1897.

W. R. Butler, Esq., O'Neill, Neb.

My Dear Sir: Your favor of January 16th addressed to the Attorney General has been handed to me for reply. Several inquiries are contained in your letter of which I suppose you have a copy and I will endeavor to answer them in their numerical order.

First—The law does not imperatively demand that the county board should count the cash in county depositories each year, but good business judgment does make that demand.

Second—The law does not require that new bonds be given by depositories annually, but they should be required as often as the security and safety of the county funds demand.

Third—A change in ownership of a bank, the same being a county depository would require that a new bond be given and the cash ought to be counted. In other words the cash ought to be called in and then it could be deposited when the new bond is given.

Fourth—The law does not require the county board to approve a bond for the full amount, but I think the proper course to pursue would be either to approve it for its full amount or reject it altogether. I very much doubt if they have authority to approve a $10,000 bond for $6,000.

Fifth—I do not find any provision in our statute authorizing the county board of the county to refund precinct bonds after the precinct has been divided into two separate townships.

Sixth—The County Commissioners undoubtedly have power to make original levy for the payment of said bonds until they are paid.

Seventh—The County Commissioners have no authority to designate which banks the county funds should be deposited in. If a number of the banks have given bonds which have been approved by the county board it then becomes optional with the County Treasurer to deposit the funds in either bank he may choose, provided however, he must not deposit more than the legal amount which each becomes entitled to under its bond.

Trusting that the answers will be satisfactory and aid you in your official duties, I am,

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

January 21, 1897.

Bernard McGreevey, Esq., O'Neill, Neb.

Dear Sir: Your favor of January 18th addressed to the Attorney General has been handed to me for answer. You are rspectfully advised that it is the opinion of this office that the county board in making this settlement with the county treasurer has the right to demand of him that he produce the funds which the records show to be in his possession that they may count the same and ascertain that he has in fact the actual amount of money which he claims to have. While this may prove a temporary hardship on those banks in which the money has been deposited, it is the only safe course for the board to pursue. It is the course which this office has advised the state treasurer in the premises.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

January 23, 1897.

Dr. L. J. Abbott, Superintendent Hospital for the Insane, Lincoln, Neb.

My Dear Sir: Governor Holcomb has referred to this office your inquiry of January 16th relative to the right of the Sheriff of Lancaster County to serve legal notices upon patients under your care. I find nothing in the stautes of this state which would seem to prevent this. I believe the proper thing for you to do would be to refuse the officer access to those parts of the building wherein those patients are located. You have exclusive control over them and the officer has no right to insist upon seeing them in person. If he delivers the writ to you, you are under no obligation whatever to deliver the same to the patient, and if, in your opinion, it would be detri-

mental to the patient to have the same called to his attention, then you would be perfectly justified in withholding the same from the patient. I trust this will enable you to prevent the annoyance which you say is being caused.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 23, 1897.

W. E. Goodhue, Esq., Hebron, Neb.

My Dear Sir: Your favor of January 18th making inquiry as to the right of county commissioners of your county to compromise a judgment already obtained against the bondsmen of an insolvent bank of your county, in which certain county funds were deposited, has been duly received.

This office is of the opinion that the commissioners would not be warranted in compromising a judgment for five thousand dollars and take two thousand dollars. As long as the amount due the county was in dispute they probably had the power to compromise the claaim, but now that the claim has been reduced to a judgment I do not think that any such power exists. It would be very inexpedient for them to take such action. Parties who execute bonds ought to understand that in so doing they make themselves liable for the full amount of the bond.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 23, 1897.

W. L. Mathews, Esq., County Attorney, Grant County, Hyannis, Neb.

My Dear Sir: The Attorney General has referred to

me your inquiry of January 16th with reference to the validity of a certain tax levy made by the county board of your county. Your letter states that on June 11th, 1896, the board first made a levy of nine mills for County and general purposes and subsequently, but at the same sitting of the Board made an additional levy of four and and one half mills, with which to pay a certain judgment against the county. You make inquiry relative to the validity of the last mentioned item. Under our statute the county board has no authority to levy an assessment of more than 15 mills. Under section 77 of chapter 77 of the Revenue Law of this state, the county board has authority to levy a tax of not more than nine mills on the dollar for ordinary county revenue including the support of the poor. This nine mills must include the amount set apart for the payment of judgments rendered against the county, but need not include the amounts levied for roads nor for the bridge fund. If, therefore, the county board has levied a tax of nine mils exclusive of the tax for roads and the bridge fund then it would have no authority to levy an additional four and one half mills for the purpose of paying this judgment. You had better examine the record and see if this nine mill levy is exclusive of the levy for roads and bridges. If it is the limit has been reached and they could not legally levy an additional four and one-half mills.

Very. truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 25, 1897.

Hon. Silas A. Holcomb, Governor, Lincoln, Neb.

My Dear Sir: You have referred to this office and ask for an opinion relative to the regularity of certain pro-

ceedings had in the district court of Cheyenne County, Nebraska, in the matter of the forfeiture of certain lands belonging to the estate of Robert F. Fawcus, deceased.

I have given this matter careful attention and have the honor to report as follows:

In 1889 the Legislature of Nebraska passed an act entitled, "An act restricting non-resident aliens and corporations not incorporated under the laws of Nebraska, in their right to acquire and hold real estate, etc."

The proceedings had in the District Court of Cheyenne County were under and by virture of this statute. Under this act non-resident aliens are prohibited from acquiring title to real estate either by descent devise, purchase or otherwise.

In the case under investigation it appears that Robert F. Fawcus was prior to his death a resident of Cheyenne County, Nebraska. It does not appear whether he was an alien or citizen of this state. He died in May, 1896, leaving a last will and testament in which certain real estate was devised to John G. Fawcus. It appears that John G. Fawcus is now, and at the time of the death of Robert F. Fawcus was a non-resident alien being a citizen of and residing in England. This being true, John G. Fawcus, cannot under the laws of this state acquire title to this real estate by devise, and therefore the will of Robert F. Fawcus was inoperative, and so far as it attempted to devise this real estate to John G. Fawcus was of no force or effect whatever. Since the laws of this state prohibit John G. Fawcus from taking title to real estate by devise it must necessarily follow that this will was inoperative for the purpose of conveying title to the said John G. Fawcus. Such being the case upon the death of Robert F. Fawcus the land would descend to

his heirs at law the same as though no will had been made.

The papers before me do not disclose whether Robert F. Fawcus left any heirs at law, and if so, whether or not they are residents or non-residents, aliens or citizens. Neither were the heirs at law of Robert F. Fawcus made parties to the proceedings in the District court of Cheyenne county, wherein the forfeiture was claimed. Section 1, of the act of 1889 provides that the widow or heirs of aliens who have heretofore acquired lands in this state may hold such lands for a period of ten years.

It does not appear from this record whether or not Robert F. Fawcus was a citizen of this state or not, but if he was not, still his widow, if he left one, or his heirs at law, if any he had,would be entitled to hold this land for a period of ten years and would have a right to dispose of the same at any time within that period, during which time no proceedings could be had to bring about a forfeiture of the same to the state of Nebraska. Section 2 of the act of 1889, provides for bringing into court those non-resident aliens to whom the land would descend upon the death of the ancestor.

The act under which these proceedings were had is in derogation of the common law and since the proceedings are adversary in their character the statutes should be strictly construed.

If this Chapter would prohibit John G. Fawcus from taking this land by devise, then he has no interest in the estate. If Robert F. Fawcus left any heirs at law they are the ones to whom the money should be paid, in the event any is to be paid, and I think they would be necessary parties to any proceedings had under and by virtue of this act.

I am forced to the conclusion that there was a defect

of parties and that the records before me do not disclose sufficient facts to warrant the state in paying the appraised value of this land. Grave doubts might be entertained as to the validity of the act in question, but I do not deem it necessary to express an opinion upon that at this time. For the reasons hereinbefore stated I think nothing should be done by the State in the way of paying out any moneys to John G. Fawcus or to those representing him, on account of the proceedings had in this matter.

I have the honor to remain,

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 26, 1897.

H. H. Mauck, Esq., County Attorney, Nelson, Neb.

My Dear Sir: Your favor of January 23d received, asking for the opinion of this office touching certain matters arising under subdivision 6 of chapter 79 of our statutes entitled, schools.

You are respectfully advised that it is the opinion of this office that sections 4726 to 4729 contemplate that those pupils shall attend a high school of approved grade in the county of their residence. If they attend a high school located outside of the county in which such pupil or pupils reside the matter of their tuition must be settled between themselves and the high school which they attend.

The taxes provided for in section 4729, and the tuition which the school district is entitled to under section 4728, is for pupils outside of the district but in the county in which such school is located. I do not think the high schools in Edgar, Clay county, and in Davenport, Thayer county, have any legal claim against your county

for tuition on account of the attendance at such high schools of pupils residing in Nuckolls county.

Yours very truly,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 26, 1897.

Hon. Silas A. Holcomb, Governor, Lincoln, Neb.

My Dear Sir: Touching the inquiries made by Hon. S. F. Barrows, International Prison Commissioner, relative to the procedure in this state when an accused person is adjudged irresponsible on account of his mental condition, I have the honor to report as follows:

Section 454 of our Code of Criminal Procedure provides that after a verdict of guilty has been returned and before judgment is pronounced, if the accused person becomes insane, then no judgment shall be given while such insanity continues, and if judgment has been pronounced and the same has not been carried into execution and such person shall become insane, it then becomes the duty of the court to empanel a jury and try the question, whether the accused be at that time sane or insane. Of course if the accused were insane at the time of the commission of the offense, that would be a perfect defense to the action brought by the state. Under these proceedings the accused would not be liberated, but would be dealt with as an insane person until he became sane, and then the sentence of the court would be carried into effect.

Second: The question of his sanity or insanity would be decided by a jury convened under the orders of the court. The defendant might appeal from such decision.

Third: If the defense is made that the accused at the time of committing the offense was insane, that question would be submitted to the jury together with the other

questions in the case. If the claim is made that the accused became insane subsequent to the commission of the offense, the question submitted to the jury under such circumstances would be, is the accused now sane or insane?

Fourth: The judicial authorities would not order the release of an insane convict, but would order him dealt with as other insane persons.

Fifth: Medical persons are called upon for opinions at the time of the investigation of his insanity. The extent to which they are called upon depends largely upon the industry of the attorneys for the accused.

Sixth: I do not know of any legislative document bearing upon the criminal insane in this state. The law has no doubt been criticised, but I do not know of any printed volume of criticisms that could be sent this party.

Seventh: You are prepared to answer the seventh and eighth questions better than I am.

I beg to remain,

Very truly yours,

ED. P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 27, 1897.

Hon. Dudley Smith, Secretary, Lincoln, Neb.

My Dear Sir: I have your favor of the 25th addressed to C. J. Smyth, Attorney General, asking for an opinion upon certain matters desired by your caucus. I would much prefer that the Attorney General answer these questions in person, but owing to his absence I am forced to give you the conclusions to which I have come after some considerable study and investigation.

As to your first question I would say that the presumptions are all in favor of the constitutionality of the

act and no reasons for doubting it have been urged that to my mind are serious.

It has been suggested that H. R. 550, was in effect amendatory of section 139 of our ballot law and therefore in conflict with a certain provision of our constitution. House Roll 550 applies only to elections at which two or more constitutional amendments are to be voted upon. It is a special statute, remedial in its nature and applicable only in certain cases. Section 139 of our ballot law provides for such matters only by implication, if at all. It was certainly competent for the legislature to make express provisions for just such cases as this. Even if the act of 1895 be treated as amendatory of the ballot law, still I think the latter act is good. The act of 1895 was complete within itself and expressly repealed all acts or parts of acts in conflict therewith. In the case of the State, ex rel. Seward County vs. Benton, 33 Neb., 823, the Supreme court of this state held that an act subsequent in time but complete within itself and fully covering any subject would by implication repeal prior acts touching the same matter without any reference in the latter act to the former. If this be true, even if the act of 1895 was amendatory in its nature, a point I do not wish to concede, still I think it was legally enacted.

I am not prepared to answer the last part of your first question. I do not know how many votes were cast for the amendments and can express no opinion upon that point.

Second—Section 1, article 15 of our constitution provides that proposed amendments to the constitution shall be published in certain newspapers for three months "immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection and if

a majority of the electors voting at such election adopt such amendment the same shall become a part of the constitution." I think the words, such election used in this section of the constitution has reference to the election of senators and representatives. When the constitution says it must receive a majority of the electors voting at such election I think it means it must receive a majority of the votes cast for senators and representatives. This was the view taken by the Supreme Court of this state of that law in the case of the State vs. Babcock, 17 Neb., 188. In that case the court used this language: "The votes necessary to adopt an amendment to the constitution in pursuance to section 1, article 15 of the same must be a majority of all those cast in the state at that election for senators and representatives." I have no reason to suppose that a different rule would be followed by the court as now constituted, such being the case it would be necessary to ascertain the number of votes cast throughout the state for senators and representatives and also the number cast for the proposed amendments.

Third—If the acts submitting the amendments be void then it would necessarily follow that the amendments were not submitted in a lawful or legal manner and I think that would invalidate the election. In other words, if the amendments were voted upon in a manner not recognized by law, I think it would be illegal and they could not be lawfully adopted.

Fourth—If the legislature sent to each county for the returns and these returns were counted by a committee properly appointed, that would not of itself destroy the value of the ballots as evidence in a subsequent legal proceeding. In the case of Martin vs. Miles, 40 Neb., 135, this same question was before the court. In that case the ballots had been sent for and brought to the legisla-

ture and returned to Cheyenne county. In a subsequent legal action they were excluded as testimony, but it was on the ground that they had been placed in a position to be tampered with by interested parties, and there was no evidence offered tending to show that they had not been tampered with. The rule laid down in that case seems to be that the burden would be on the party offering the ballots in evidence to show that they had not been tampered with while they were out of the possession of the county clerk of the county from which they were taken. This might be difficult to do, but if it could be shown that the ballots were returned to the county clerk in the same condition as they were when they were sent to the legislature then they would be admissible in evidence.

This is the rule announced by our Supreme Court, not only in the case above referred to, but in the case of Albert vs. Twohig, 35 Neb., 563.

This I believe answers all your questions submitted by your committee and I have the honor to remain,

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 28, 1897.

F. M. Walcott, Esq., County Attorney, Valentine, Neb.

My Dear Sir: The county treasurer of your county has given me your favor of the 23d, and has asked that I write to you respecting the question contained therein. I explained matters fully to the treasurer, Mr. Crabbe, but he desires that I write you in addition thereto.

First—Let me say, I know of no reasons for questioning the constitutionality of the law to which you refer.

The presumptions are all in its favor, and I would leave it for the Supreme court to question its validity.

Second—As to the manner of listing the lands, and publishing the notice of delinquent taxes I advised the treasurer that, in my opinion, he ought to publish the same in the same manner as they were certified to him by the county clerk. In other words, if the tax list sent to him by the county clerk describes these lands in 40 acre tracts, then the treasurer ought to advertise them in the same form, and collect 20 cents for each description. If, however, it is certified to him in 160 acre tracts, then he ought to advertise the lands by that description. I do not think it is for the county treasurer to divide these tracts or to consolidate them. The county clerk in certifying the same to the county treasurer, ought, as near as possible, to certify the same in the form in which the final receipt or patent from the government is issued, or the deed made unless the same has been subdivided since that time.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Jan. 30, 1897.

W. H. Cain, Esq., County Attorney, David City, Neb.

My Dear Sir: Your letter of the 28th addressed to the Attorney General has been received. Mr. Smyth is absent from the city and for that reason cannot give your letter personal attention. My own views in the premises are that the townships in your county outside of David City are entitled to one Justice of the Peace, and that David City is entitled to two Justices, each of whom, I think, serves two years.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Feb. 1, 1897.

J. A. Douglas, Esq., County Attorney, Bassett, Neb.

My Dear Sir: Your favor of January 29th addressed to the Attorney General has been duly received at this office. Answering the questions contained in your letter I would respectfully advise you that it is the opinion of this office that under section 3368 of the Compiled Statutes, the sheriff is entitled to the same mileage for conveying an insane patient to the hospital that he is for serving a summons or other process.

2.—I do not believe the county is liable for any expenses of keeping a prisoner after he has been sentenced to the penitentiary. I believe all these expenses must be paid by the state upon a warrant issued by the Auditor.

3.—The county board would, no doubt, have the right to settle these judgments, if in their opinion, after a careful examination of all the surrounding circumstances, it would be for the best interests of the county to do so. It is not a question of what is best for the debtors, but merely a question of what is for the best interests of the county.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Feb. 6, 1897.

William B. Miller, Esq., County Attorney, Gosper County, Elwood, Neb.

My Dear Sir: Your favor of February 3d addressed to the Attorney General has been duly received at this office. I note what you say in regard to the liability of this party for the payment of certain taxes assessed against a bank corporation that is now out of existence. You say in your letter that the only stock holder now in

in the county became a stock holder on the first of June, 1888, and it is for the tax of that year that you make the inquiry. If you will refer to section 6, chapter 77 of our statutes entitled, "Revenue," you will see that personal property shall be listed between the first day of April and the first day of June, and that it shall be assessed with reference to the quantity held or owned on the first day of April. Such being the case, if this party did not acquire his stock until the first day of June, 1888, he could in no event be held liable for the tax assessed against the bank in that year. It is very doubtful if a distress warrant could be run against a stock holder in a bank for taxes levied against the corporation, but however that may be it is very plain that a party who does not acquire stock until June of any year cannot be held liable for taxes assessed against the corporation for that year.

Very truly yours,
ED P. SMITH,
DeputyAttorney General.

Lincoln, Neb., Feb. 6, 1897.

A. Norman, Esq., County Attorney, Valley Co., Ord, Neb.

My Dear Sir: Your favor of February 4th addressed to the Attorney General has been duly received at this office. The Attorney General is absent from the state, and I shall lay this matter before him when he returns. Since the railroad has brought suit on this and you are now in court it would be advisable to make the best fight you can. It is my opinion, however, that the fifteen mill limit applies as well to counties under township organization as to those not under such organization. I have expresed that opinion to a number of county attorneys throughout the state, but since you are already in court

it might be well to make a fight for the legality of the acts.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Feb. 17, 1897.

Hon. John C. Watson, Nebraska City, Neb.

My Dear Sir: This office acknowledges the receipt of your communication asking for an opinion as to the vote necessary to carry certain school district bonds by the school district of your city.

While there may be some doubt in the premises the conclusion arrived at is, that those bonds are issued under and by virtue of section 24, chapter 79, subdivision 14 of the statutes of our state, and if the same received a majority of the votes cast at such election they may be issued. We believe the amendment passed by the legislature in 1893 was intended to cover such cases. This conclusion finds suport in the closing part of the opinion of Commissioner Irvine in the case of Fullerton vs. School District, 41, Neb., 593.

Very truly yours,
ED P.SMITH,
Deputy Attorney General.

Lincoln, Neb., Feb. 19, 1897.

Mr. William Cook, Hebron, Neb.

Dear Sir: I have at the hands of Hon. J. R. Morrison your favor of the 8th inst. enclosing proposed ordinance No. 87, and requesting my opinion with reference to the constitutionaality of said ordinance. Section 1 thereof, provides substantially that any person under the age of fifteen years who shall be or remain upon any

street or alley of the city of Hebron after the hour of nine o'clock p. m. during certain months of the year, unless such person is accompanied by a parent, guardian or other person shall be guilty of an unlawful act and upon conviction shall be fined not to exceed five dollars.

Section 4176 of the Compiled Statutes of 1895, provides substantially that when a boy or girl under the age of sixteen years shall be convicted before an inferior court of any crime, etc., the Magistrate shall forthwith send the boy or girl together with all papers filed in his office on the subject to a Judge of a court of record who shall do certain things, and in the subsequent sections it is provided that if the judge be satisfied that the boy or girl is a fit subject for the State Industrial School he may commit him or her to said school. You see, therefore, that there is a conflict between the proposed ordinance and the statutes of the state. The ordinance leaves no discretion with the court, but declares that it shall, upon conviction, fine the boy or girl not to exceed five dollars. The statutes say that the boy or girl shall be sent to a Judge of a court of record, who, if he finds the boy or girl a fit subject for the Reform School shall send him or her to said school. That it is not within the power of the Mayor and City Council to repeal or in any way modify the statutes of the state is beyond question. Therefore, in my opinion, since a conflict exists between the proposed ordinance and the statutes the ordinance if passed would be void.

This exact question was before the District Court of Douglas county and upon full argument the Court held that the ordinance could be sustained. I understand that a petition in error will be filed in that case and the matter brought before the Supreme court for review and decision. In that event we will get the decision of the high-

est tribunal of the state upon this much mooted question of the right of City Council to pass the "Curfew Ordinance."

With reference to the other sections of the ordinance which provide punishment for parents or guardians permitting their children to be out after the hour of nine o'clock p. m. during certain months of the year, I think that they are so dependent upon and connected with section 1, which I have just discussed that they would have to fall with the other section.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Feb. 20, 1897.

His Excellency, Silas A. Holcomb, Governor.

My Dear Sir: In returning herewith the letter of John W. West, of Grand Island, I have the honor to report that the fact, if it is a fact, that this party has been convicted of a crime and sentenced to the penitentiary would not ipso facto revoke his commission. It would undoubtedly be sufficient grounds to justify a revocation by you, but it does not work a revocation in itself.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Feb. 27, 1897.

Hon. John F. Cornell, Auditor of Public Accounts.

My Dear Sir: Referring to your question, as to whether or not you may draw a warrant upon a certain fund for the purpose of paying a debt not within the purpose of said fund, I answer that you may not do so under

the law. Money appropriated by the legislaure for a certain purpose can be used for that purpose only.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 5, 1897.

C. B. Scott, Esq., Kearney, Neb.

My Dear Sir: Yours of the 26th ult. was duly received but owing to pressure of business here was not answered before. Section 2438 provides that the District Judge shall appoint a stenographer, and section 2439 provides that the stenographer shall hold his position during the pleasure of the District Judge. You have been appointed by the District Judge and under these two provisions it is my opinion that you hold your office until the District Judge removes you. It was the District Judge and not W. L. Green who appointed you. While W. L. Green's term as District Judge has ceased, the District Judge continues in existence and the act of Green as District Judge in appointing you continues in force until set aside by his successor.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 6, 1897.

Hon. E. W. Nelson, Deputy Commissioner Public Lands and Buildings.

My Dear Sir: I have your favor of the 24th ult. asking for the opinion of this office with respect to certain matters contained in a letter from the County Treasurer of Dakota county, which letter is enclosed with yours. The Treasurer states that he notified the persons now in

possession of the land described to appear at his office and receive the appraisement money for improvements. This is not enough. He must, in my opinion, seek the persons upon the land and tender to them in legal tender money of the United States the amount of the appraisement. If they accept the money and refuse to yield possession or if they refuse the money and refuse to yield possession it will then become necessary to commence legal proceedings against them. If the legal title to the land is in the person who purchased it, that is to say, if a deed has been issued to them, the suit ought to be brought in their names. If the legal title is still in the state the suit ought to be brought in the name of the State. In any event good faith would require that the State stand the expenses necessary to place the purchasers in possession. All expenses for the legal proceedings should be borne by the State.

Under section 603 it is the duty of the County Attorney to give attention to such proceedings.

All papers submitted except your letter are herewith returned.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 6, 1897.

Hon. J. V. Wolfe, Commissioner of Public Lands and Bulidings.

My Dear Sir: On February 18th I received from you a letter stating that the Nebraska Hospital for the Insane desired to have a part of section 8-9-6 set aside for the use of the hospital and asking my opinion as to the manner in which this might be done. In February Mr. Nelson, your deputy, informed me by letter that this same

piece of land had been set aside for the use of the Hospital by the Board of Educational Lands and Funds and asking for my opinion as to the proper steps to be taken in the matter. With Mr. Nelson's letter was a copy of one from Dr. Abbott, the Superintendent of the Hospital, stating that Robert K. Johnson was in possession of the land mentioned above and refused to vacate and asking you for instructions as to what steps were necessary to put the Hospital in possession of said land.

As the title, to this land cannot be transferred to the Hospital, I take it that the purpose of the Board of Educational Lands and Funds was to place the Hospital in possession of it until such time as the land might be sold or rented, with the view of permitting the Hospital to use it for agricultural purposes for the benefit of the institution. If this be true, since the Board of Educational Lands and Funds has already authorized the Hospital to go into possession, there is but one question for decision, and that is, how to get the present occupant, Mr. Johnson, out of possession. It seems to me that an action in forcible entry and detention brought by the State before any Justice of the Peace would accomplish the purpose. If it be your desire I will notify Mr. Johnson to vacate, and if he does not do so I shall cause the necessary court proceedings to be commenced at once.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 9, 1897.

Hon. H. Whitmore, County Attorney, Franklin County, Franklin, Neb.

My Dear Sir: I have yours of the 8th asking the opinion of this office as to whether or not County war-

rants payable by virtue of section 14, of chapter 93 of the Compiled Statutes of 1895 bear interest after the holders of such warrants have been notified by the County Treasurer that he has money with which to pay them. In my opinion, section 4 of the same chapter governs. Under that section interest on county warrants ceases, at least upon receipt by the person in whose name the warrant is registered in the notice provided by the section, that the Treasurer is ready to pay the warrant. If the Treasurer complies literally with the terms of the section by placing the amount of money necessary to pay the warrant in an envelope sealing the same as required by cestion 4, it is my opinion the interest would cease upon the sealing of the envelope.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 10, 1897.

Hon. John F. Cornell, Auditor of Public Accounts.

My Dear Sir: I have your letter of this date asking my opinion with regard to the meaning of the following part of section 3432 of the Compiled statutes of 1895, that is to say: "Such statement shall also show to the full satisfaction of the Auditor of State that said company has deposited, in some one of the United States or territories, a sum not less than $25,000, for the especial benefit or security of the insured therein." You ask my opinion as to what is referred to by the word "therein." I think it clearly refers to the Insurance Companies. In other words the provision is in substance that the Companies must have deposited the same for the benefit of the people insured in the Companies.

This question was before the Supreme Court of this

State in the case of The State vs. Benton, 25 Neb., 835, to which I refer you for a more elaborate discussion of the question.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 12, 1897.

Hon. J. G. Thompson, County Attorney, Alma, Neb.

My Dear Sir: I have your favor of the 10th stating that in the year 1896 the various townships of Harlan county requested the County Board to make a levy, which in the case of each township when added to the sum levied by the board on its own account exceeded fifteen mills, and asking for the opinion of this office as to whether or not the excess over fifteen mills was legal. My opinion is, that it was not.

When the constitution of 1875 was adopted there was no township organizations in the State. Therefore the only County authorities having power to levy taxes was the County Board, composed of the Commissioners, and the framers of the constitution must have had in mind when adopting section 5, article 9, the County Board only. That Board was charged with all the duties that now devolve in part upon the Board and in part upon the township organizations. For the purpose of perfecting those duties the constitution limited the power of the Board with respect to the levy of taxes to fifteen mills on the dollar. This is as large a tax as the constitution was willing should be levied upon the people of any county, in the state for the performance of those duties. The township organizations perform no additional duties. How then can it be said, under section 5 of our constitution, that a County having township organization can

have a larger tax than a County which is not so organized? Besides, this provision of our constitution was taken, I think, from Illinois. In addition to the provision taken, the Illinois constitution had a provision to the effect that wherever a County adopted township organization this limitation upon the power of the County Board should not be effective, but that the legislature might fix a limit. The framers of our constitution did not adopt that part of the Illinois constitution. This therefore, indicates that those who drafted our constitution did intend to have the limitation in section 5, article 9, apply to counties without reference to whether or not they were under township orgaization.

The excess levied is, in my opinion, void. Wherever paid under protest the Treasurer is bound to return it and if he does not the party paying it may maintain an action at law for its recovery. This point was settled in the case of The Railroad Company vs. Nemaha, 69 N. W., 958.

While the foregoing contains my present opinion with reference to the law, I recognize that the question presented by you is not entirely free from doubt. An argument might be based upon the idea that the townships were municipal corporations, but I am afraid that, for the reasons which I have advanced above, such an argument would not be sustained by the Courts.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 17, 1897.

Hon. W. R. Jackson, Superintendent of Public Instruction.

My Dear Sir: In the matter of voting bonds by school districts in this State outside of cities, you are re-

spectfuliy advised that it is the opinion of this department that such election must be by ballot, the form of the ballot and the manner of conducting the election to be that prescribed under the Australian ballot law. Section 3038 of the election laws of this State provides that School Districts outside of cities are excepted from the provisions of the Australian ballot law in the election of School District Officers. That is the only exemption that I have been able to find in the statutes. If the legislature had intended that School Districts when voting bonds should be exempt from the provision, they would no doubt, have included that with School District Officers. But the fact that they only exempted the election of School District Officers would seem to indicate that all other elections were to be held under the provisions of that law. Every reason that could be urged in favor of the Australian ballot law at general elections can be urged with as great force when these districts are voting upon the issuance of bonds. In my opinion they ought to follow the provisions of that law at an election held for that purpose. Certainly they can lose nothing by it, and any other method might lead to expensive and troublesome litigation.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., March, 22, 1897.

Hon. W. R. Jackson, Superintendent of Public Instruction.

My Dear Sir: Your letter of this date asking the opinion of this office as to whether a man having the qualifications of age and residence is a voter at school meet-

ings by virtue of his wife's ownership of real estate in the District or by virtue of his wife having children of school age residing in the district, and also whether a woman having the qualifications of age and residence is a voter at such meetings by virtue of her husband's ownership of real estate in the district or by virtue of her husband having children of school age residing in the district. In my opinion, in either case the person referred to would be voters at such meetings.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., March 23, 1897.

To the Honorable, The Committee on Claims, House of Representatives.

Gentlemen: I beg to return herewith the papers in the matter of the claim of T. P. Kennard against the State of Nebraska, all of which were submitted to this office by the Chairman of your Committee with a request that there be furnished you an opinion touching the legality of this claim. In the limited time I have had to investigate this matter, and with only such evidence before me as has been furnished your committee by the claimant I do not feel warranted in advising your committee that this is a legal claim. This claim is a very old one and ought not to be allowed without a very thorough investigation of its merits. The fact that it has been before Legislative committees at previous sessions and has been rejected tends to discredit the claim upon its merits. It may be, however, that this claimant has a just and legal claim against the State, if so he ought to be paid. I beg leave to call your attention to section 1106 of the Code of Civil Procedure. By this section you

will see that there is a provision under which these claims may be referred to the District Courts of the State for adjudication. In my opinion, this course ought to be pursued in this matter. A resolution from the House, stating in substance that this claim ought not be paid until the amount due Mr. Kennard has been adjudicated in a Court of competent jurisdiction, would enable him to bring suit, and if he has a just claim the amount of it could be established in that action. That course would relieve your committee of the responsibility of determining this matter and at the same time could work no injustice to the claimant. I have the honor to remain,

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lncoln, Neb., March 25, 1897.

A. E. Garten, Esq., County Attorney, Albion, Neb.

My Dear Sir: Your favor of March 24th was duly received at this office. I note the inquiries you make concerning the powers of the County Board over depository banks. You are respectfully advised that it is the opinion of this office that the County Board has the power and it is its duty to withdraw its approval of any bond given by a depository bank, if the Board becomes satisfied that the bond for any reason has become insufficient. It would then be the duty of the County Treasurer to withdraw the funds from such bank for the reason that the bank would no longer be a depository bank. The County Board could call for an additional bond and upon failure to give the bond could withdraw its approval of the bond already given by the bank. I do not think the Board woul be under any obligations to make a record of their reasons for demanding additional security. Their

conclusions might be corect, even though the particular reasons they might assign would not be well founded. I think the bond given by the bank ought to contain a statement of the rate of interest which the bank agrees to pay. The obligation of the bank is to pay the moneys promptly on demand and also to pay the interest. After the County Commissioners have approved a bond in the sum of $50,000 they have no right to limit the amount that the Treasurer may deposit at any on time to $16,000. The statutes provide that the amount of money deposited shall not exceed fifty per cent of the amount of the bond. The statute does not give to the County Board the right to specify the amount of money which the Treasurer may deposit in any one bank. The duty of the County Board is performed when they approve or disapprove the bond.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., March 26, 1897.

Harry S. Dungan, Esq., County Attorney, Hastings, Neb.

My Dear Sir: I return herewith the questions propounded by your County Clerk, together with the conclusions of this office upon the same.

1. In counties under township organization the township authorities have not the power to levy taxes. All they do at their annual town meeting is to determine the amount of taxes they think they ought to have and then certify the same to the County Board. The County Board alone has the authority to levy those taxes. The County Board has the power to reduce the amount so certified to them by the township authorities, or they have power to ignore it altogether. The County Board in levying those taxes expressly provide the number of mills

that shall be levied for the different purposes. For example, it can levy a certain number of mills for general purposes, a certain number of mills for a road and bridge fund, etc. But the township authorities, as such, have no power to levy any taxes whatever, nor is the County Board under any obligation to levy the exact amount certified by the township organization.

2. The opinion of the Attorney General to which you refer was that fifteen mills covered all the taxes levied by the County Board including such as are levied for general purposes, and also such as are levied expressly for the townships. If the County Board should levy fifteen mills for County purposes, including roads and bridges and in addition thereto should levy a certain number of mills exclusive for township purposes the latter would be illegal and void.

3. If the County Board should levy, say nine mills for County purposes, it might in addition thereto levy an additional one mill for a certain township, three mills for certain townships and five mills for certain townships. From the wording of the questions submitted I infer that the opinion prevails that the townships have a first right to make a levy of seven mills. I believe this to be entirely wrong. A township has no right whatever to levy a tax. It can simply make a request to the County Board, and the County Board can use its own judgment. I trust this answers the questions propounded. I beg to remain,

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Neb., March 29, 1897.

A. L. Bishop, Esq., County Attorney, Bartlett, Neb.

My Dear Sir: Your favor of March 26th making in-

quiry relative to the rights of your County against your County Treasurer is duly received. From your letter it appears that no bank was designated by your County as a depository bank, but the Treasurer deposited certain County funds in the Bank of Ewing, receiving interest thereon and turning the interest into the County treasury. The Bank of Ewing having failed the County Treasurer now seeks to avoid liability on his bond on the ground that the County having received interest on the funds deposited by him in such bank, thereby ratified his action in making the deposit and relieved the bondsmen from liability, because of the loss of these funds.

You are respectfully advised that it is the opinion of this department that this defense is not good. In the first place the Treasurer had no right to deposit this money in this bank. If he did so, he did it upon his own responsibility. Under the law of this State the County Treasurer is forbidden to make any profit on County funds, but if he does make any profit he is obliged to turn the same into the County Treasury. If the County Treasurer loans or invests the money belonging to the County and receives any interest thereon the law would compel him to account for the same and turn all interest and profit received into the County Treasury. If he has voluntarily paid this fund into the County Treasury, he did nothing more than what the law would have compelled him to do. By accepting this interest the County in no sense relieved him or his bondsmen from the liability to account for all money which came into his hands. I think there is no doubt of the liability of the Treasurer and his bondsmen for all money belonging to the County lost in the Bank of Ewing.

As to the second proposition, you are advised that this matter has been before this office from a great many

different sources in the last few months, and the opinion of the Attorney General, as given to all those making the inquiry, is that, in no event can the County Board levy a tax to exceed fifteen mills. The fact, if it be a fact, that in past years, they have failed to levy certain taxes which they might have levied, would not justify them in making a levy to exceed fifteen mills at this time. I do not think the County Clerk would be liable for his failure to make this levy during the time he was Clerk. That is not such a breach of his obligations as would renred him liable on his bond.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Nebr., April 5, 1897.

John W. Long, Esq., Loup City, Neb.,

My Dear Sir: Your favor of April 2d addressed to the Attorney General has been duly received. I gather from your letter that in 1889 certain premises were sold for taxes, and the tax certificate has now been assigned to the owner of the premises. The question is whether or not, under the circumstances, a redemption certificate should be issued to the owner of the land. I think under our statutes, the County Treasurer has no authority to receive from the owner of the land the redemption money after the expiration of two years from the date of the sale, even though the deed be not demanded at that time by the holder of the certificate, still the Treasurer has no right to receive the money from the owner of the premises. If the tax sale certificate has now been purchased by the owner of the land, and the same has been returned to the County Treasurer, I do not believe it necessary to issue the redemption certificates, but

simply note on the records that the certificate of sale has been cancelled and returned. That ought to be sufficient to clear the title from any lien or cloud.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Nebr., April 6, 1897.

W. K. Bean, Esq., Hemingford, Nebr.,

My Dear Sir: Your favor of April 5th has been received in which you make inquiry relative to the bond a druggist must give where he takes out a permit to sell liquors for medicine. You are respectfully advised that, under the law of this State, druggists are required to give bond in the sum of $5,000, where they acquire a permit to sell liquors for medicinal purposes.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Nebr., April 7, 1897.

To His Excellency, Silas A. Holcomb, Governor,

My Dear Sir: Referring to the Senate File No. 108, on the interpretation of which you have asked for the opinion of this office, I have the honor to report as follows:

Section 847 of the Code of Civil Procedure confers upon the District Court in a case brought to foreclosure a mortgage power to direct payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after the sale of the mortgaged premises. Senate File 108 repeals this section. This would seem to clearly take from the District Court any power in a fore-

closure suit to render a personal judgment against the mortgagor. If the only object in passing Senate File 108 was to prevent the mortgagee from obtaining a personal judgment in the same action in which the mortgage is foreclosed, it would seem that this was fully accomplished by repealing section 847, and you will notice that it expressly repeals this section. Section 849 of the Code gives the Court the right, under certain circumstances, to render judgment against other persons as well as the mortgagor, who may be liable for the debt. Senate File 108 expressly repeals this section. By repealing these two sections it seems to me the District Court would have no power in that action to enter any kind of a judgment or decree except a decree ordering a sale of the mortgaged premises. Section 848 as it stood before Senate File 108 was passed, prevented the mortgagee from maintaining an action in a Court of equity and a separate action in a court of law to recover the debt secured by the mortgage, unless authorized by the Court. As section 648 now reads, I do not understand that the mortgagee must be specially authorized by the Court to bring suit for the unpaid portion of the debt after the mortgaged premises have been sold, the sale confirmed and the deed delivered. This section is a little ambiguous, but after the sale has taken place and the deed has been delivered I do not understand that the mortgagee is in any manner prohibited from then commencing a separate action at law to recover any balance due him. It is only while his action is pending in a court of equity to foreclose that he is prohibited from commencing a separate action at law, unless authorized by the Court. Senate File 108 merely takes away from the Court the right to authorize a suit at law, where it would now be necessary to obtain that authority. If the mortgagee at the

present time has the right to go into a Court of law after he has secured his deed, I think he would still have that right under Senate File 108. In other words, in all these cases where he could subsequently prosecute a separate and distinct action at law without consent of Court, that same action could be prosecuted under Senate File 108.

I have the honor to remain,

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Nebr., April 14, 1897.

His Excellency, Silas A. Holcomb, Governor.

My Dear Sir: In compliance with your request, I have examined House Roll No. 175, the same being a bill for an act to amend sections 2, 3, 6, and 7 of the act which provides for the depositing of State and County funds in banks. The principal changes made by this act, are:

1. The funds are deposited in bulk and the account of the same is kept as one instead of being credited to the different funds.

2. The form of the bond is different, and

3. The amount which they may deposit in any bank is hedged about by additional limitations.

The main point upon which an opinion was requested was, whether or not new bonds should be executed. Upon this matter I am free to say I am not perfectly clear, but in order to avoid any possible question that might arise in the future I believe new bonds should be executed. There would be no question but the bonds already executed would cover all funds deposited in the banks prior to the time this bill becomes a law, but after this bill becomes a law, then that part of the law

which authorizes the giving of the bonds now held by the state will be repealed. If money should be deposited after this bill becomes a law, and an action should be brought in the future to collect the same from the bank's bondsmen, might they not insist that no bond had been given under and by virtue of the law in existence at the time this money was depoosited?

I do not feel warranted in saying that defense could be successfully interposed, but in order to avoid any possible question and a possible loss of State funds, I believe new bonds should be required of depository banks.

I have the honor to remain,

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Neb., April 27, 1897.

John Tongue, Esq., Stromsburg, Nebr.,

My Dear Sir: Answering your favor of April 20th, you are respectfully advised that under the recent act of the Legislature, the County Treasurer may legally deposit in a depository bank, not to exceed fifty per cent of the bond which has been approved, and in no event not to exceed 30 per cent of the paid up capital stock in of the bank. I am unable to furnish you a copy of this bill, but have indicated its provisions.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Nebr., May 6, 1897.

Hon. A. E. Sheldon, City,

My Dear Sir: Permit me to answer the two following questions this day propounded by you to me:

1. Is it the duty of the State Printing Board, created by the law known as House Roll 571, to assemble at once and appoint an expert as provided by section 13 of said law?

2. Does the fact that the Legislature appropriated to the different state officers a sum of money to pay for the necessary stationery in any way affect the validity of said law?

In answer to the first question, I think it is clearly the duty of the Board, to at once carry out the provisions of section 13.

2. My answer to the second question is, no. The law appropriated $12,500 for all printing required under contract, etc. The stationery for the various State officers and Boards should be done under contract, and therefore, the Board may draw out of this sum of $12,500 appropriated the money necessary to pay for such stationery, but that course is not necessary. To illustrate: If the Booard ordered stationery for my office in accordance with the terms of the law known as House Roll 571, it would be the duty of the Board to approve a voucher for such stationery. This, of course, would not authorize the auditor to draw against the fund appropriated to my office for the stationery named. If I thought the voucher is correct I could approve it, and thus authorize the Auditor to draw against the fund appropriated to my office for printing and stationery. What is true of my office would be true of the other offices and Boards.

Very truly yours,

C. J. SMYTH,

Attorney General.

Lincoln, Nebr., May 17, 1897.

J. R. Swain, Esq., County Attorney, Greeley, Neb.,

My Dear Sir: Answering your favor of May 13th relative to the power of your county to issue bonds for School District No. 10, you are respectfully advised that it is the opinion of this office that the act of 1887 referred to in your letter confers power upon the County Board to issue bonds in a case like that to which you refer. By section 2 of that act, you will see it refers to "any such indebtedness of whatever form." This would clearly imply that the power to issue bonds was not limited merely to pay indebtedness already evidenced by bonds. This act does not seem to contemplate that the bonds shall be placed on the market and existing indebtedness paid out of the proceeds of such bonds. Section 3 of the act in question expressly provides that the bonds may be issued to the holder or holders of the indebtedness so surrendered, cancelled or satisfied. You will also notice that by section 3, the amount of bonds so issued cannot exceed the original indebtedness, hence if the bonds are issued to take up outstanding warrants, the amount of the bonds must not exceed the face of the warrants. They cannot be issued for the amount of the warrants and accrued interest, if any. This whole act contemplates a compromise and not a mere novation of the contract or indebtedness. Your letter would indicate that you were in doubt only as to whether or not this act covered indebtedness, not bonded. I trust I have made myself plain on that point.

Very truly yours,

ED. P. SMITH,

Deputy Attorney General.

Lincoln, Nebr., May 17, 1897.

Anna Gray Clark, County Superintendent, Ogalalla, Neb.

My Dear Madam: Your favor of May 12th, addressed to the Attorney General has been handed to me for investigation and reply. I have given this matter consideration and have the honor to advise you that, in the opinion of this department, the County Court had not jurisdiction to make an order such as your inquiry contemplates. The jurisdiction of the Caunty Court under our statutes is limited, and it can exercise only such powers as are conferred upon it by statute. Senate File 199 does not by express terms confer power upon the County Court to enter an order to sell the property of a dismembered district. It merely states that such an order can be entered by a Court of competent jurisdiction. The District Court of this State is the only Court of general jurisdiction in the State, and where the power to make this order is not in express terms conferred upon the County Court this department is of the opinion that it could not lawfully enter the same. I have the honor to remain,

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Nebr., May 18, 1897.

Hon. John F. Cornell, Auditor of Public Accounts,

My Dear Sir: Your favor of May 17th addressed to the Attorney General has been given attention, and touching the inquiries contained therein you are respectfully advised as follows:

1. As to the claim of George W. Leidigh and others amounting to $1075.60 for labor performed during the month of April, 1897, your inquiry is, can you legally draw a warrant against the appropriation made in 1895

to pay this claim? The act of 1895 made an appropriation for maintenance and employees' wages for the penitentiary and provides as follows:

Section 1. The following sums of money or so much thereof as may be necessary are hereby appropriated out of any money in the treasury not otherwise appropriated for the payment of the current expenses of the State government for the years ending March 31st, 1896, and March 31st, 1897, and to pay miscellaneous items of indebtedness owing by the State of Nebraska."

This clearly shows that the Legislature of 1895 intended that the moneys therein appropriated should be used only in payment of expenses of the State government for the years ending March 31st, 1896, and March 31st, 1897. It appears from your communication that the claim of Mr. Leidigh is for the services performed during the month of April, 1897. Such being the case, the appropriation made by the Legislature in 1895 is not available for the payment of this claim. While it is true that the amount appropriated in 1895 would not lapse back into the treasury until the 31st of August, 1897, yet it is not available for the payment of claims which arise after March 31st, 1897. You are advised that it is the opinion of this department that you cannot legally issue a warrant against the 1895 appropriation to pay the claim first referred to in your communication.

2. As to the claim of H. H. Glover & Co., it appears that a portion of the goods furnished by these parties were furnished in March, 1897, and a part in April, 1897. The rule which would govern the claim of Mr. Leidigh above referred to, is applicable in this case and it follows that for those goods furnished in March, 1897, a warrant should be drawn against the appropriation of 1895, and for those furnished in April, 1897, a warrant should be drawn against the 1897 appropriation.

The rule laid down by our Supreme Court seems to be that while this money appropriated in 1895 does not lapse back into the treasury until the 31st of August, 1897, yet, it is available only for the payment of claims which arose prior to the first of April, 1897. A claim which arose prior to that date could be paid out of the 1895 appropriation, even though not presented to your office until after the first of April, 1897.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Nebr., May 21, 1897.

To His Excellency, the Governor,

Sir: In my opinion, the law providing that the Under Secretary of the Board of Irrigation shall receive not to exceed $800.00 per year including expenses, means that not more than $800.00 shall be expended for the services and expenses of the Under Secretary by the Board for a period commencing on a given date in any month, and ending with the day before in the same month a year hence. The Irrigation year commences on the first of April and ends with the 31st of March.

With respect to the services rendered by Secretary Akers since the first of April, 1897, I am of the opinion that those services must be paid for out of the 1897 appropriation, and not out of the appropriation for the two years ending March 31st, 1897. An examination of the appropriation law passed in 1895, will show that the appropriations made therein, were for the two years ending March 31st. 1897. Therefore, that appropriation does not cover any services rendered after March 31st.

The appropriation for the Secretary of the Board made by the law of 1897 is considerably less—the exact amount I do not know—than the salary fixed by the law

creating the office of secretary. Hence, the question arises, shall the Secretary be paid for the services rendered in April according to the law creating the office, or according to the appropriation made? The question is not free from doubt. It is my opinion, however, that while the law fixes the salary, the law without an appropriation would be of no value to him. It gives him no right which he could enforce. The sum fixed by the Legislature for the two years ending March 31st, 1899, was by the Legislature intended to be a complete compensation for the services of a secretary for two years for that Board, and hence, that the Secretary is not entitled to receive per day or per month more than a proportionate share of the entire sum appropriated. If Mr. Akers is allowed pay for the twenty-eight days in April, according to the law fixing the salary of the Secretary, the person who now fills the position of Secretary would not receive the sum which the Legislature intended he should receive, but would receive the sum less the extra amount paid to Mr. Akers. This I do not think a fair interpretation of the law would warrant.

Respectfully submitted,

C. J. SMYTH,

Attorney General.

Lincoln, Neb., May 23, 1897.

M. H. Fleming, Esq., County Attorney, Crete, Neb.,

My Dear Sir: Your favor of May 21st addressed to the Attorney General has been given to me for reply. The authorities seem to be to the effect that no liability is created against your County by the issuing of warrants under an unconstitutional statute. There seems to be a difference between liability on warants and on bonds issued under certain circumstances. The principle of estoppel some times enters into the case where bonds have been is-

sued, but that rule does not apply in the case of warrants. If you will look at the case of The Mayor vs. Ray, 19 Wallace, U. S., 468, you will find a case in which this matter is discussed.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., May 21, 1897.

Hon. J. N. Lyman, Treasurer Adams Co., Hastings, Neb.

My Dear Lyman: Your favor of May 17th duly at hand. My opinion was dictated today and will be in the hands of the President of the Board of Educational Lands and Funds tomorrow. It is against the power of the Board to permit the redemption of bonds at this time. I have had the matter under advisement this long in the hope that I might see my way clear to advise the Board to grant the request of your County. A most careful consideration of the constitution and the law together with the decision of the Supreme Court found in the 15th Nebraska, compels the conclusion that the Board has only the power to invest the fund, and after having invested it, it cannot change the contract of investment. In a word, the power of the Board to invest does not carry with it the power to divest.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Nebr., June 24, 1897.

A. E. Garten, Esq., County Attorney, Albion, Nebr.,

My Dear Sir: Answering the inquiry contained in the letter of your County Treasurer, you are respectfully

advised that, in the opinion of this department, the action of your County Board does not vitiate the bond, but the safe course to pursue is not to deposit to exceed $7500. The action of the County Board is not easily understood, and it may be they intended to authorize the deposit of $15,000, but the safe course would be not to deposit to exceed $7500, unless they change the order approving the bond.

Yours very truly,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Nebr., June 24, 1897.

J. H. Berge, Esq., County Treasurer, McCook, Nebr.,

My Dear Sir: Your favor of June 23d addressed to the Attorney General has been duly received. You are respectfully adivsed that the statute does not provide any fees for the County Treasurer, where he invests sinking funds in warrants, and hence, he would not be authorized or warranted in charging fees for such serivces. County Treasurer's fees are regulated wholly by statute, and where there is no provision of the statute providing for his fees he cannot charge or collect them.

Yours very truly,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Nebr., June 23, 1897.

Hon. J. V. Wolfe, Commissioner of Public Lands and Buildings,

My Dear Sir: I herewith return Lease contracts No. 15176-7, and in answer to your inquiry you are respect-

fully advised that, in the opinion of this department, you have no right to enter upon the records of your office that these contracts are now owned by Mr. Dewey. These contracts were originally made to George Turner, and show upon their face that they were assigned by Turner to William H. Crane. There is no written assignment to Dewey, and I do not think that the lack of such assignment, and the assignment which does appear to Crane can all be overcome by mere affidavits. I do not think it would be safe for your department to act upon such evidence.

Yours very truly,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Nebr., June 26, 1897.

Hon. J. V. Wolfe, Commissioner of Public Lands and Buildings,

My Dear Sir: I return herewith memorandum relative to Senate File No. 312, and in answer to the inquiry submitted by Mr. Nelson, I have to say that I do not see how Senate File No. 312 can be sustained, at least so far as it affects that portion of sections 9-9-6 E, the same being school land. The act in question purports to set this land aside for the use of the Hospital for the insane. If the intention of the legislature was to give this land to that institution, it seems to me that the act is in conflict with the constitution, and amounts to a diverting of the permanent school fund. This land could no doubt, be leased to the Hospital for the Insane, the same as it could be leased to a private individual, but I do not believe that it was within the power of the Legislature to transfer this land to the Hospital for the Insane. If that was

the purpose of Senate File No. 312 I think it was clearly illegal.

Yours very truly,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Nebr., June 26, 1897.

Hon. Edward R. Duffie, Omaha, Nebr.,

My Dear Judge: I have endeavored to examine the proposed articles of incorporation of the Knights of the Forest, and there are still some objections which I think will have to be remedied. By article 10, this corporation assumes the obligataions that have been incurred by private individuals in their efforts to organize this Company. I do not believe the institution should be burdened with these debts. Article 15 gives the officers of the order power to borrow money, and "power to obligate the order and its members for the payment thereof." This would seem to imply that each and every person who held a certificate in the order might be obligated for the payment of money borrowed by the officers of the order. I do not believe the officers should have the power to borrow money at all. Certainly they should not have power to obligate the members for the payment thereof. Objection is also raised by the Auditor that, under the law, these societies have no power to buy or sell real estate. I am disposed to agree with him in that regard. It may be that this authority ought to be granted such institutions, but the legislature has not conferred that power, and I believe their powers are only such as have been expressly conferred upon them by act of the legislature. I believe your articles ought to be amended to conform with

these suggestions before being approved by the Executive officers of the state.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., June 29, 1897.

F. M. Walcott, Esq., County Attorney, Valentine, Neb.

My Dear Sir: Answering your favor of recent date, you are respectfully advised that, in the opinion of this department, the County Board would not have the right to offset taxes that became due and delinquent after the claim had been assigned, if the notice of the assignment was filed with the County Board or the County Clerk at or about the time the claim was assigned. These claims are supposed to be due before they are filed with the Board, and if the County has no claim at that time against the assignor, then I think the latter would have the right to assign his claim and the assignee would hold it free from any offset, which might accrue to the County at a later date.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., June 29, 1897.

William Grots, Esq., Germantown, Neb.

My Dear Sir: Answering your favor of June 25th, you are respectfuly advised that, in the opinion of this office, if the election officers locate the election booth within 100 feet of your barn, it would not be a violation of the election laws for persons to congregate in your

barn and talk politics on election day. Persons would have no right to congregate in the barn and commit a breach of the peace, but I think you have the same right to discuss politics in your barn on election day that you would have at any other time.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., June 29, 1897.

A. E. Garten, Esq., County Attorney, Albion, Neb.

My Dear Sir: Answering your favor of June 26th, I believe the action of the Board is intended to mean that they approved the bond for $15,000 and not for $30,000, otherwise their words would have no significance whatever. Under the circumstances I think the only safe course for the Treasurer to pursue, is to deposit not to exceed $7,500 in that bank with the bond standing as it is. I am not clear that the bank would not have a right to have a writ of mandamus issued to compel the Board to approve the bond for $30,000, if, as a matter of fact, it is a good and sufficient bond for that amount. I do not understand that the Board has arbitrary power to approve or reject a bond, and if this bond is good and sufficient for $30,000, I know of no reason why a writ of mandamus should not be invoked.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 3, 1897.

Hon. J. V. Wolfe, Commissioner of Public Lands and Buildings.

My Dear Sir: I have your letter of May 31st, asking

my opinion as to whether or not the right of way of the Union Pacific Railway Co., (200 feet on each side of the track), granted by the Act of Congress of July 1, 1862, over the public lands, attaches to school sections 16 and 36 reserved by Act of Congress of May 30th, 1854, for the benefit of the comon schools. This question presents a great many considerations, and while I have not given to it, because I cannot do so at present, the time which I would like to, yet I feel quite certain of my conclusion. The Act of Congress approved May 30th, 1854, reserved sections 16 and 36 for the benefit of the common schools of the territory of Nebraska.

The Act granting certain lands to the Union Pacific was passed in 1862. This grant was of public lands. Section 2, thereof provides that the Company shall be entitled to a right of way, 200 feet on each side of the track over the public lands. This act was modified by the Act approved July 2, 1864, and under and by virtue of this Act , the right of the Union Pacific attached to the lands granted, October 19th, 1864, "Public Domain," page 766. In this Act of July 2, 1864, a provision is made for the securing to the Company of right of way over the public lands, and the Company is authorized upon certain conditions to take 100 feet on each side of the center of their track. In the case of Brown vs. The Northern Pacific, 145 U. S., 539, the Supreme Court of the United States held, after citing a number of previous decisions of the same court, that public lands, meant lands which were not reserved or disposed of in any way, but which were subject to sale. Sections 16 and 36 were reserved by the United States, and hence they were not public lands when the Railway Company built through them. Just when the Company did build through them I am not advised. If it did so subsequent to February, 1864, it had a right to do so under a law of the territory of Nebraska, which

gave to Railroad Companies the right to use so much of the school lands of the territory of Nebraska, as might be necessary for its right of way. (Section 34 of the laws governing railroads, General Laws, 1864.) Who, under that section was to determine how much the Company needed, is left an open question, but as the laws of Nebraska deemed 100 feet on each side of the center of track sufficient, and as the law of the United States passed July 2, 1864, deemed the same quantity sufficient, I am inclined to think that 100 feet on each side of the center of the track would be the amount which the law would say the Company might take and use through the school lands of the state.

I am of the opinion, therefore, that if the Company did not build until after the passage of the law of February, 1864, that it would certainly have the right to at least 100 feet on each side of the center of the track through school lands of the state, and I think this would be true, even if the Company built prior to the passage of the Act of 1864.

But the Union Pacific Company claims 200 feet on each side of the center of their track. I do not believe that it is entitled to this amount. My conclusion from the hasty examination made, is that the Railroad Company has no right to more than 100 feet on each side of the center of its track, through the school lands of the State. I return you herewith letter of Mr. Johnson, lease and plat.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 3, 1897.

E. W. Nelson, Esq., Deputy Commissioner of Public Lands and Buildings.

My Dear Sir: Your favor of June 18th was duly re-

ceived, but owing to pressure of business was not answered before. In it you propound this question: "Whether or not Saline lands will come within the provisions of the new school land law, H. R. 124, and if we will be debarred from entering into sale contracats for this, the same as other kind of educational lands."

My answer is that Saline lands do not fall within the provisions of the new school land law. That law is intended to take the place of Chapter 80, which it repeals. In no place is any reference made to chapter 69, which appertains to Saline lands. The subjects of each law are entirely distinct. The school lands are under control of the Board of Educational Lands and Funds. The Saline land is under the control of the Board of Public Lands and Buildings. For these as well as other reasons that I might state, I give the answer above set forth.

Referring to your favor of May 29th, in which you ask what rate of interest should be paid by those who are in arrears with respect to their rent upon lease contracts of school land, there is nothing with respect to this matter in Chapter 80, which contains the law governing the handling of school lands. I have read the letter of Attorney General Hastings, and I do not think that the answer therein given the commissioner means anything. The Attorney General said that the rates of interest to be charged on such arrears, was the rate fixed in the contract. The contract provides that the lessee shall pay a certain rental which shall be equivalent to six per cent of the appraised value of the land, and that is all that it does say with respect to the amount of money which he shall pay. There is, therefore, nothing in the contract about the rate of interest to be paid. Section 4, chapter 44, of the Compiled Statutes of 1895, provides among other things that "on money due on any instrument in writing, interest shall be allowed at the rate of seven

per cent per annum." This, I think is applicable to leases of school land, and hence, in my opinion, the rate of interest on all sums delinquent on such contracts should be seven per cent.

Respectfully submitted,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 3, 1897.

W. R. Butler, Esq., County Attorney, Holt County, O'Neill, Neb.

My Dear Sir: Your two letters under date of the 26th ult. were duly received at this office, but owing to my absence therefrom on official business, did not come to my hands until yesterday.

With respect to the copy of the official bond of your Treasurer forwarded to me for my opinion, as to whether ro not it is a valid bond, permit me to say that, in my opinion, it is. The conditions of the bond embrace all those required by law. It is signed by the principal and two sureties, and I cannot conceive of any ground upon which it could be held void. True, the names of the principal and of the sureties are not written in the body of the bond. That is an informality which I do not think would affect in any way. The statute provides that informalities in the execution or approval of a bond shall not render it void. The oath of office is not endorsed on the bond, but appears below the signature of the principal and sureties. This is an informality, which I do not think would affect in any way the validity of the instrument. Section 13 of chapter 10 provides, that no official bond shall be rendered void by reason of any informality or irregularity in its execution or approval. Apart from all this, I think that Mr. Mullen and his sureties would be estopped from raising any question upon the informalities referred to.

With respect to the power of the Board of Supervisors to appoint appraisers of school land, while said Board is in session as a Board of Equalization, I have this to say: Whether it has such power or not is, in my opinion, of little importance. The action of the appraisers must finally be approved by the Board of Educational Lands and Funds. I would say, therefore, let your Board of Supervisors at their present session appoint appraisers, and if the appraisement is a fair one, I think that the Board of Educational Lands and Funds will pass it.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 9, 1897.

To the State Printing Board, Lincoln, Neb.

Gentlemen: I have examined the claim of the Woodruff-Dunlap Printing Co., assigned to Jacob North & Co., for printing the report of 1895-6 of the Board of Irrigation, and my opinion is that it ought to be paid out of the appropriation made for "Printing laws, journals, and other printing required under c ontract" of the appropriation law of 1897.

It is true that Jacob North & Co. printed this report under a contract let in December, but the Supreme Court has decided that that contract was improperly let, and therefore North's work was done without authority and is in law the same as if not done at all. Under the date of June 25th, 1897, the State through its Printing Board entered into the contract with the Woodruff-Dunlap Printing Co. for printing this report. In contemplation of the law this report has been printed under that contract, otherwise the Auditor would have no authority to issue a warrant for the payment of the claim. Since the law looks upon the claim as having been created under

this contract of June 25th, then the claim is for the work done since the first of March, 1897, and should come out of the appropriation for 1897.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 12, 1897.

Hon. Clark O'Hanlon, County Attorney, Blair, Neb.

My Dear Sir: Your favor of July 6th with respect to the liability of the County for damages to certain railroads because of the construction of a public highway across the right of way of the railroad companies was duly received. It seems to me that the question which you have to deal with is settled in the case of The State ex rel, Lancaster County vs. The C. B. & Q. 29 Neb., 412. That was a mandamus to compel the railway company to construct a crossing where its road crossed a public highway in Lancaster County. The highway was laid out after the road was constructed. The Company contended that as the highway was laid out after the construction of the road it was not the duty of the company to put in the crossing. The Court held otherwise, and declared that it was the duty of the company under sections 110-13 of chapter 78. If it be the duty of the company to put in the crossing the company cannot claim damages for putting the crossing in. It cannot be said to be damaged by doing its duty.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 14, 1897.

F. W. Boggs, Esq., County Attorney, Boyd County, Neb.

My Dear Sir: Yours of June 26th asking how cer-

tificates issued under section 83, chapter 78 of the Compiled Statutes of 1895, are to be paid or taken up by the County was duly received, but owing to my absence from this office on official business not answered before. I am of the opinion that the certificates are to be registered and paid as county warrants are paid, out of the general fund, the certificate being treated as a warrant.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 30, 1897.

C. P. Logan, Esq., County Attorney, Grant, Neb.

My Dear Sir: Yours of the 19th was duly received but owing to pressure of business not answered before. It is my opinion that it is your duty to advise the Superintendent of your County and to commence and conduct the suit provided for by section 25, subdivision 2, chapter 79, but you are not required to do more. You are not required to serve any private individual. In view of the small salary allowed you, I think under section 29 of the same subdivision and chapter the County Attorney would have the right to employ a private attorney and pay him for his services. The amount allowed for the services to be included in the amount which the Court shall allow to the Superintendent for performing the duties imposed upon him.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 30, 1897.

M. H. Redfield, Esq., County Clerk, Omaha, Neb.

My Dear Sir: Yours of July 14th was duly received but owing to presure of business not answered before.

The law which you ask me to construe is exceedingly loose in its provisions. The only reasonable construction of which it admits is that the original articles shall be filed with the County Clerk. I think there is no warrant for the County Clerk recording the articles. Recording them, in my opinion, would serve no good purpose, since the law does not appear to require it to be done. The fee which you may charge for filing them should be regulated by what you charge in analogous cases. I hardly think it was the intention of the legislature to require you to file them without a fee, and hence the above construction.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 30, 1897.

C. C. Pool, Esq., Deputy Auditor Public Accounts.

My Dear Sir: Your favor of July 13th with draft of voucher attached was duly received. The question upon which you ask the opinion of this office is substantially as follows: In making the computation to ascertain the amount of fees which a County Treasurer is entitled to for collecting state money, should the amount of money collected for the County and from all sources upon which that official is entitled to fees be taken into consideration. My answer is that they should, except the school funds. Section 20 of chapter 28 of the Compiled Statutes makes this very clear. It is therein provided that on all moneys collected by the treasurer he shall receive ten per cent on the first $3,000, etc., and in computing the amount collected for the percentage, all sums from whatever fund derived shall be included together, except school funds. In the case of the State vs. Broderick, 25 Neb., 629, the Supreme court was asked to say whether or not the Treas-

urer of Gage County, in calculating the amount of fees which he was entitled to receive from the city should segregate the city money from the county and state funds, and figure upon the city moneys alone. The Court decided that he could not; that he must calculate the amount of his fees upon the entire amount collected by him upon which he was entitled to receive fees, always excepting the school fund. The same principle applies with respect to the question submitted by you.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 30, 1897.

A. E. Garten, Esq., County Attorney, Albion, Neb.

My Dear Sir: Yours of July 28th with enclosure from Judge Hamilton received. The question propounded is: "Whether the judges and clerks of election who were elected at the last general election act as such at the coming election or whether said law is retroactive and legislates them out of office."

My answer is that the law is not retroactive, but it legislates them out of office. The law under which they were elected and from which they derive their authority ceased to have an existence on the 9th day of July, 1897. It is, therefore, the duty of the County Judge to make the appointments in accordance with the provisions of the new statute.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Aug. 7, 1897

G. W. King, Esq., County Judge, Gering, Neb.

My Dear Sir: Your favor of August 3d addressed to the Attorney General has been duly received at this of-

fice. After a somewhat hasty examination of the statute referred to, you are respectfully advised that it is the opinion of this department that the power to put a boy or girl over sixteen years of age in the Reform School exists only where such person has been found guilty of such an offense as would warrant a sentence in the penitentiary. By section 5 of chapter 75, as amended in 1897 you will see that it provided "The Court may, if in its opinion, the accused is a proper subject therefor, instead of entering judgment or committing said boy or girl to the penitentiary, he shall cause an order to be entered that said boy or girl be sent to the State Industrial School." This would clearly indicate that where the person is over sixteen years of age he or she may be committed to the Reform School only where the Court might, if it thought best, commit such person to the penitentiary. Of course, where the person has only been found guilty of mendicancy, vagrancy, or of being incorrigible, no authority would exist for committing the defendant to the penitentiary and therefore, no power exists to commit to the Reform School. In the case of a married woman over sixteen and under eighteen, I do not believe any authority exists for committing her to the Reform School under any circumstances.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Aug. 7, 1897.

E. H. Riggs, Esq., County Attorney, Brewster, Neb.

My Dear Sir: Answering your favor of August 5th addressed to the Attorney General you are respectfully advised that it is the opinion of this department that general fund warrants must be received by the County Treasurer in payment of taxes whether for the same year or not. These warrants are due and payable as soon as

issued and constitute valid obligations against the County and the latter cannot refuse to accept its own paper in payment of obligations due it.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Aug. 9, 1897.

George Hansen, Esq., County Clerk, Bloomington, Neb.

My Dear Sir: Answering your favor of August 3d, relative to the form for Instructions to Voters, you are respectfully advised that the form should be as appears on page 586 of the Compiled Statutes of 1897. The purpose of the statute is to give the voter as much information as possible to assist him in preparing his ballot. These instructions are contained in Schedule "B", and it is clear from reading section 150 that the form should be that set forth on page 586. In addition to schedule "B" what were the original sections, 26, 27, 28, and 29, but which are now numbered 152, 153, 154, and 155 should be printed. The numbering of these sections in the Compiled Statutes for 1897 was done by the party who compiled the statute and not by the legislature itself. This accounts for the difference in numbers.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Aug. 12, 1897.

Alex Ellis, Esq., McCook, Neb.

My Dear Sir: Answering your favor of August 8th addressed to the Attorney General, you are respectfully advised that under the new ballot law any political party which did not have a candidate for the various offices at the last election cannot secure a place on the ticket this year only by petition, and their candidates could not

style themselves as silver republicans or otherwise, but would simply go on the ticket under the head of "by petition."

2. If more than one party nominates the same person for an office such candidate would be entitled to have his name printed on the ballot under each party name and the judges and clerks of election would give him credit for the aggregate number of votes he received. The votes should not be counted as cast for two persons of the same name.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Aug. 13, 1897.

R. G. Strong, Esq., County Attorney, Pender, Neb.

Dear Sir: Answering your favor of August 7th addressed to the Attorney General, you are respectfully advised:

1. Under section 5, article 9, of the constitution of this state, all fines arising under prosecutions for a breach of the vilage ordinances are paid to the Village Treasurer and belong to the same, but under this section such money must be appropriated exclusively to the use and support of the common schools in the respective subdivision where the same may accrue.

2. The Justice cannot require the County or any other municipal authority to pay him such costs. It is one of the duties which pertain to his office, and if he is unable to collect the costs from the defendant in the case, he cannot require the County or Village to pay the same.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., Aug. 30, 1897.

Hon. John F. Cornell, Auditor of Public Accounts.

My Dear Sir: This office is in receipt of your communication making inquiry as to the appropriation out of which clerical help employed by the State Printing Board can be paid. We have investigated this matter and beg leave to advise you as follows:

House Roll No. 614, was amended by the Conference Committees of the two houses, and under the head of "Miscellaneous," appearing on page 441, of the printed Session Laws for 1897, was made to read as follows: "Laws, Journals, and other printing required under contract, and clerical help required by the State Printing Board, $12,500," but when the bill was enrolled the words, "and clerical help required by the State Printing Board," were omitted. We have made a personal examination of the report of the Conference Committees, and have seen the original papers. We know the words, "And clerical help required by the State Printing Board," are in the report as adopted by the two Houses. Under the ruling of our Supreme Court, the bill as actually passed by the two Houses should govern, where there is a difference between the bill as passed and the bill as it comes from the enrolling clerks. Such being the case, we believe that a warrant in payment of clerical help required by the State Printing Board can be drawn against this $12,500, so apropriated by House Roll No. 614.

Very truly yours,

C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., Aug. 23, 1897.

Mr. Ambrose C. Epperson, County Attorney, Clay Center, Neb.

Dear Sir: Your favor of recent date, addressed to the Attorney General, was duly received at this office. I gather from your letter that your County Board levied a tax in 1896 under the provision of the High School law, which our Supreme Court has recently decided to be unconstitutional. The question now is, what shall be done with this tax. It appears from your letter that claims have been filed under this law, and you are respectfully advised that it is the opinion of this department, that the County Board should use the money thus paid for the purpose of satisfying the claims thus filed. If there is not enough to pay the claims in full they ought to pro rate. This tax was unconstitutional, but the parties having paid the tax the county holds the same in trust for the purpose of applying it to the claims filed with the Board. As to the levy made in the year 1897, it should be stricken from the tax list, and resolutions duly passed by the County Board, ordering the County Treasurer to strike the same from the list would seem to answer the purpose fully.

Very truly yours,
ED. P. SMITH,
Deputy Attorney General.

Lincoln, Neb., Aug. 27, 1897.

John V. Pierson, County Attorney, Ponca, Neb.

Dear Sir: Your favor of August 25th has been duly received at this office. The matter of the appointment by the County Judge of the Judges and Clerks of election, under the new law, has been considered by this department, and while the intent of the law is plain the matter of its application is a little bit cloudy. There is no doubt

but the intention of the legislature was that each political party should have representatives on this election board, and if two parties united on the same candidate it was not intended that by so doing one or the other would be deprived of representation on the election board. In every precinct there are three judges of election. The republicans are no doubt entitled to one of them. No one questions seriously that the democratic and people's independent parties each cast more votes than the gold democrats. The conclusion we have arrived at is that in legal proceedings, the democrats or populists would not be confined to the election returns for the purpose of showing that each of those parties cast more votes than did the gold democrats, and the evidence of individual voters might be taken for the purpose of proving that fact. Such being the case, each of these parties should have representation on the election board. I do not think that the two together ought to be regarded as one party. Neither do I think that either party is entitled to credit for the entire number of votes their candidates received. In making up the list of judges I think the republicans, democrats and populists each ought to be given one judge. As to how the clerks should be selected, must depend on the number of votes cast in the precinct for the several parties. Since there are but two clerks all three of the parties cannot be represented. In some precincts, the vote may have been such that the republicans are entitled to one clerk. Where in other precincts they may not be entitled to any. I trust this is satisfactory and beg to remain,

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., Aug. 26, 1897.

Hon. J. H. Edmisten, Chairman People's Independent Party, Lincoln, Neb.

My Dear Sir: Permit me to acknowledge the receipt at your hands of a letter addressed to you by F. S. Mickey, Esq., of Hebron, Neb., with respect to the law passed by the last legislature concerning the appointment of judges and clerks of election. In this letter Mr. Mickey states that the County Judge of Thayer County, "Has announced that he will rule that, the people's independent party and the democrats were one party last fall, and requests us to make nominations for judges and clerks of election accordingly," and that "the County Judge says he cannot tell from the returns what vote each party casts," and "moral certainties don't go." That is, the County Judge proposes to treat the democratic party and the people's independent party as one party, and to give to both only the number of judges and clerks of election which one party would be entitled to. This conclusion he has reached because "he cannot tell by the returns, what vote each party casts," and "moral certainties don't go." Upon this statement of facts, you ask the opinion of this office, as to whether or not the County Judge's position is correct. My answer is that it is not, and about this there ought to be no doubt. The law provides "the County Judge shall select for each precinct, one judge of election from the party polling the highest number of votes at the last general election in the precinct, and one judge from the party polling the next highest number of votes at the last general election in the precinct, and one judge from the party polling the third highest number of votes in the precinct." How is the judge to determine which party polled the highest number of votes and which party the next highest, and which the third highest? If the votes polled in the county by the populists and democrats,

were accounted for separately, the polling lists would probably furnish satisfactory evidence of the facts, but the law does not make the polling list the evidence of the fact. The law leaves open the method of proving the number of votes cast for each party. The fact therefore that the votes as cast by the democratic and populist parties last fall were not accounted for separately by the judges and clerks of election does not prevent each party from proving the number of votes cast by it. The County Judge will or should take judicial knowledge of the fact that the democratic and populist parties have an organized existence in Thayer County. If, however, he refuses to do so, then let the fact be proven. That once established, the next step should be to prove the number of democratic or populist votes cast in each precinct. This can be done by calling the voters. It will not be necessary to show all the votes cast by each party. Where it has been shown that enough were cast to give the party either the second or third rank, the party having the burden of proof may rest. To do this may not be necessary in more than one precinct, for after the fact that both the democratic and populist party cast votes in that precinct at the last election has been established, a fair minded judge will not require that proof be given with respect to each precinct in the county, in fact I do not think that any fair minded judge should require any proof. However, this may be, it is as I have before stated, the duty of each County Judge to take judicial knowledge of the fact, that both the democratic and populist parties had any existence, and cast votes at the last election. This being a fact, there never can be a contest except between the gold bug democrats and the party which would claim a third place. When that contest is made, the party claiming third place can settle it against the gold bugs by proving that it cast more votes than the gold

bugs. The moment that it shows that it has cast one vote more, that moment it becomes entitled to third place. The conclusion then is that if the gold bug democrats in Thayer county make any claim to representation, the judge should take judicial knowledge of the existence of the republican democratic and populist partics, and give each the representation it is entitled to under the law.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 4, 1897.

A. L. Bishop, Esq., County Attorney, Bartlett, Wheeler County, Neb.

My Dear Sir: Your letter of August 25th was duly received. This is the letter: "A certain man having a judgment in the Justice Court and a transcript of it filed in the District Court of this County, had an execution issued thereon four years from the date of the judgment, but the County Clerk and the clerk of the District Court failed to make any record of the issuance and return. Six years after the date of the judgment another is issued of which there is a record.

The judgment creditor now asks the Board of County Commissioners to make an order requiring the present Clerk to make the record of the proceedings had as shown by the original execution.

Can the Board make such an order?"

The Board is without power to make the order asked for. It has no power over the records of the District Court. Application should be made to the District Court.

Enclosed with the letter quoted above is another one from you in which you ask this question:

"Do holders of certificates of election as judges and clerks of election boards hold their offices at the coming general election or does the County Judge appoint the members of the Board for this fall?" My answer is that the repeal of the law under which the Judges and Clerks were elected legislated them out of office and it is the duty of the County Judge to appoint a new set of Judges and Clerks.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 4, 1897.

Hon. J. H. Edmisten, Chairman People's Independent Party, Lincoln, Neb.

My Dear Sir: You inform me that one of the County Judges of the State has announced that he will rule the people's independent party and the democrats were one party last fall," because, as he alleges, he "cannot tell from the returns what vote each party casts," and you ask me whether or not his position is correct in point of law.

While the law makes it the duty of the County Judge to appoint "one judge of election from the party polling the highest number of votes at the last general election in the precinct, and one judge from the party polling the next highest number of votes at the last general election in the precinct, and one judge from the party polling the third highest number of votes at the last general election in the precinct," it does not say that he is to determine the rank of each party from the poll lists; nor does it say how he is to determine it. Therefore, the party seeking to establish its rights to a judge of election may offer any evidence competent to prove the fact. To illustrate: Suppose the only vote cast in a given precinct was for the republican ticket and the allied populist

and democrat ticket and that the republican vote was kept separate, but the populist and democratic vote was not so kept. In such a case if the populist call, say five men and prove by them that they voted as populists in that precinct for the populist nominees, and if the democrats call, say, four men and prove by them that they voted in that precinct as democrats for the democratic nominees the right of the populists and the right of the democrats to one judge each would be established.

But this involves much labor and should not be required. Every County Judge should take knowledge of the fact—for every intelligent man knows it to be a fact—that the democratic and populist parties had an existence in each precinct at the last general election; that each had a ticket in the field, (the democrats nominated four electors and the populists four electors); and that each cast some votes therefor. By pursuing this course the democratic, populist and republican parties would each be entitled to one judge.

In the event that the gold democrats or either branch of the prohibition party claim a judge, then it would be necessary to call witnesses to prove that either the populists or democrats or both, as the case might be, polled more, if that be the fact, than either the gold democrats or either branch of the prohibitionists.

The law vesting the County Judges with the power to appoint judges and clerks of election is a good one because it is well calculated to produce honest election boards and hence, honest elections and no man desiring that result, be he judge or layman, should put anything in the way of the enforcement of the law. Neither should any party be deprived on a technicality of its right to representation on the board. The law should be liberally construed to subserve the right of each party to a representative.

If, however, County Judges are found who are bent upon the annulment of the law, or who are disposed to twist it into the service of party purposes, they should be taught their duty through a writ of mandamus issued by the District Court of their District.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 7, 1897.

Hon. John F. Cornell, Auditor of Public Accounts, Lincoln, Neb.

My Dear Sir: This office begs to acknowledge the receipt of your favor of September 3d, in which you ask for an opinion as to your right as State Auditor to order an examination of any and all life insurance companies doing business in this State and if such examination can be made under the law, whether the expenses of the same must be paid by the companies examined.

Sections 1 to 14 inclusive of chapter 16 of the Compiled Statutes of Nebraska were originally enacted in 1866. They may be found in chapter 2 of the general statutes of 1873. At the time of the enactment of this statute in 1866 these sections 1 to 14 inclusive constituted all the provisions in the statute especially applicable to insurance companies. In 1873 the legislature enacted what is now chapter 43 of the Compiled Statutes of this State. This act of 1873 was entitled "An act regulating insurance companies." The first twenty sections of that act related entirely to the organization of insurance companies and to the manner in which their business shall be conducted. By section 1 of this chapter these provisions contained in section 1 to 20 inclusive are made applicable to all insurance companies other than life insurance companies. Section 1 expressly says that life insurance

companies are excepted from the provisions of the act so far as their organization is concerned. It will be noticed that nearly all of the sections in this act from 1 to 20 refer expressly to companies "organized under the provisions of this act," and section 41 of the act expressly repeals chapter 25 that being the act of 1866, "except so far as the same relates to the business of life insurance companies." There can only be one conclusion reached from this, we think, and that is, the act of 1866 or chapter 16 of the Compiled Statutes of 1897 govern the organization of life insurance companies and the act of 1873 of chapter 43 of the Statutes of 1897 govern the organization of other insurance companies. It will be noticed that the title to the act of 1873 is "An act regulating insurance companies." This title is broad enough to include all kinds of insurance companies whether fire, life, accident, or otherwise, and unless the act of 1873 contains words which clearly limit its provisions to certain kinds of insurance, then it would seem reasonable to infer that its provisions apply to all kinds of insurance. Section 28 of the act of 1873 gives the Auditor the power to appoint one or more persons to examine into the affairs and condition of insurance companies. The language of the statute is, "to examine into the affairs and condition of any insurance company incorporated or doing business in this State." It will be noticed that section 28 does not use the words "organized under this act," as appears in almost every section from 1 to 20 inclusive of this act. Since the legislature inserted these words "organized under this act" in so many sections of the act of 1873 and omitted the same from section 28 of that act it would be a reasonable inference that it was not intended that the provision of section 28 should apply only to insurance companies organized under the act of 1873, but in the language of the section itself should apply to "any insurance

company incorporated or doing business in this State." I believe that was the intention of the legislature, and the interpretation which the courts would give to section 28. In other words I think under section 28, you have the right to examine life insurance companies the same as you have the right to examine fire insurance companies and the expenses of such examination must be borne by the company so examined.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 9, 1897.

E. W. Nelson, Esq., Deputy Commissioner of Public Lands and Buildings.

My Dear Sir: I have your letter of recent date containing two questions addressed to this office. The first question is: Can a County Board of Supervisors or County Commissioners legally establish a County Road over and meandering through a school section other than upon section lines?

This question presents some difficulties, but I am of the opinion that the Board of Supervisors or Commissioners as the case may be, has power to establish a County road over a school section other than upon section lines. It is provided by section 34 of chapter 78 of the Compiled Statutes of 1897 that "roads or streets shall not be established or opened across lands reserved by the State for its various institutions lying adjacent thereto without the express consent of the legislature."

If the State lands were exempt from the general power of the County Board to lay out roads and condemn and take land necessary for the purpose why pass the section just quoted exempting lands, "reserved by the State for its various institutions lying adjacent thereto?"

There could be no reason for passing it except upon the theory that the general power conferred upon the County Board with respect to laying out roads referred to said lands as well as other lands.

The second question is: "If such road can be legally established is not the permanent school fund entitled to the value of the amount of land so taken for damage to school land, for depreciation in value in consequence of such occupation of the road?"

The State is entitled to the same compensation as a private individual would be under the same circumstances. In taking State land the County Board must observe the same procedure that it would observe in case of a citizen.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 13, 1897.

Mrs. Myra E. Olmstead, Industrial Home, Milford, Neb.

Dear Madam: Yours of the 7th containing four questions were duly received and also yours of the 13th in explanation of yours of the 7th.

1st Question. Heretofore it has been a common practice sanctioned by the Auditor to draw out of one fund for goods which should have been paid out of another fund. Wherever that has been done I think it must be treated as regular.

2d Question. I find nothing in the law under authority of which those in charge of the Home could receive any cash, but if they receive cash for services rendered through the Home, then the cash should have been turned into the treasury. There is no authority of law for expending such cash. All expenses of the Home should have been paid out of appropriations made by the legisla-

ture for that purpose and upon warrants issued by the Auditor upon duly approved vouchers. This answers your third question. It also answers your fourth question. The officers of the Home had nothing to do with passing upon a claim against the Home. It was the duty of the Auditor to do that.

My opinion in connection with the whole matter is that where you find unauthorized expenditures, such as those enumerated, you should include them under a separate head, marked "unauthorized expenditures."

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 22, 1897.

P. L. Hall, Esq., Secretary Banking Board, Lincoln, Neb.

My Dear Sir: Replying to the inquiry of H. E. Vandeveer as to the method he should pursue in closing up the affairs of the State Bank of Davenport, you are respectfully advised that, in our opinion this bank has no power to compel depositors who hold time certificates to accept payment before the certificates are due. If these parties will not accept the face of the certificates with interest to date, or a reasonable compromise cannot be made with them, then there might be deposited in some other safe institution the present worth of their certificates, and this would equal their certificates and interest at the time the latter become due. This is really a matter which concerns no one but the bank of Davenport. They have given a bond to pay all obligations and that includes the payment of these certificates at the time they become due with all accrued interest thereon. Simply because they have gone into voluntary liquidation gives them no right to violate their contracts with depositors and insist on paying these certificates before

they are due. They must provide some means for meeting these certificates when they become due, and that method must be left to their own judgment. I have simply outlined a plan they might pursue, but they can use their own judgment about following that plan.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., Sept. 22, 1897.

P. L. Hall, Esq., Secretary State Banking Board, Lincoln, Neb.

My Dear Sir: Referring to the letter of inquiry from J. M. Doremus of Brooklyn, N. Y., you are respectfully advised that it is the opinion of this department that this bank would not waive any rights by taking renewals of notes they hold against the Bank of Wymore. The bond given by this bank is to pay this indebtedness, and the indebtedness would not be changed by giving a renewal of any of its outstanding notes. Of course if the Brooklyn bank should accept new notes executed by different parties or with different sureties, then the notes they now hold might be taken as payment of the old notes or such a change in the notes as would operate as a release of the bond given by this bank, but if the new notes are executed by the same parties and are identical in form with the old notes I do not believe that would release the bondsmen.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., Sept. 24, 1897.

Hon. John B. Raper, County Attorney, Pawnee City, Neb.

My Dear Sir: Owing to pressure of business I have not been able to give any attention to your letter of August 28th prior to today, and now I am not able to consider the question stated therein as thoroughly as I would like to do. First, I would call your attention to the 29th subdivision of section 24, article 1, chapter 77, which seems to contemplate that shares of stock in corporations not incorporated under the laws of this State shall be taxed in this State. In the case of

Ogden vs. The City of St. Joseph, 90 Mo., 523,

the Court had occasion to pass upon a question almost identical with the question presented by your letter. A careful discussion of the principles by which such a case should be decided is there indulged in by the Court. I would commend it to you.

At one time I was disposed to think that the situs of the stock for the purpose of taxation as well as any other purpose was in the state of Illinois. It has been frequently held that the situs of the stock for other purposes is where the corporation is located. The case to which I have called your attention, however, and the other cases cited therein seems to take a different view of the question.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 24, 1897.

Wm. P. Warner, Esq., County Attorney, Dakota City, Neb.

My Dear Sir: Referring to your recent communications relative to the case of the State of Nebraska and W. W. Knowlton vs. Ferdinand Moon involving the title to certain lands in your county, we have made something

of an examination of the authorities with a view of ascertaining the effect which the Courts ought to give to the decision of the Commissioner of the General Land Office and the Secretary of the Interior touching this same controversy. If you will examine the case of

Shepley vs. Cowen, 91 U. S., 320 (340) and
Moore vs. Robbins, 96 U. S., 530,

you will find a discussion of this subject by the Supreme Court of the United States. They there adopt the following rule:

"That the decision of the officers of the Land Department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive when in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

In all of the cases we have been able to find that rule was applied only by courts of equity and it may well be doubted whether the same rule would apply in an action at law. The general rule is that a Court of equity has power to set aside a judgment when obtained through fraud or mistake, but a court of law does not possess that power.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 28, 1897.

Senator C. W. Beal, Legislative Investigating Committee,
Lincoln, Neb.

Dear Senator: Yours of the 27th propounding certain questions to me was duly received. I answer the questions in the order in which they have been stated by you.

1. The moneys referred to therein belong to the State. If they have not been used for State purposes and have not been paid into the treasury they have been embezzled.

2. The moneys therein referred to have been expended without authority of law, but if expended for the State's benefit, I doubt if a criminal action would lie, but a civil action on the bond would lie.

3. A civil action on the bond would lie for the moneys mentioned in this question.

4. The money referred to therein was expended without authority of law. As a matter of law I believe that it could be recovered by the State.

5. The moneys referred to therein were irregularly drawn out of the treasury. If they were, however, spent as a matter of fact for travelling expenses the State could not recover. It is your duty, therefore, to take testimony upon that point before determining upon how you shall treat the sum mentioned.

6. What is true of the 5th is also true of the 6th.

In general I would say that where there is any doubt as to what the money was used for, it is your duty and it is within your power to take testimony for the purpose of clearing up the doubt.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Oct. 2, 1897.

H. H. Mauck, Esq., County Attorney, Nelson, Neb.

My Dear Sir: Answering your favor of September 28th addressed to the Attorney General, you are respectfully advised that we have given this matter such attention as we can with the great amount of work on hand at the present time, and it is the opinion of this department that the terms of the mortgage do not of themselves prevent the prosecution of the mortgagor under section 10, chapter 12 of the Compiled Statutes of 1897. That part of the mortgage in which the words "Thayer County" appear merely provide the terms and conditions under which the mortgagee would be entitled to take possession of the mortgaged property. They do not constitute a part of the mortgage creating the lien upon the stock. Section 10, chapter 12 above referred to provides that "if any person after having conveyed the property by chattel mortgage shall, during the existence of the lien created by the mortgage, remove the property out of the county within which said property was situated at the time the mortgage was given thereon, such person shall be deemed guilty, etc."

It seems clear that the mortgage in question created a lien upon this lot of steers in Nuckolls county. The mortgage seems to have been filed in that county. Such being the case if he removed the property unlawfully and with intent to deprive the mortgagee of his security, it falls within the section of this statute referred to and the fact that the words "Thayer county" were not changed to Nuckolls county in the latter part of the mortgage would not, we think, prevent a prosecution.

Of course, you understand that it is a very difficult matter to convict a person under this section of the statute even when the circumstances are the most favorable to the prosecution. It might be that this oversight in changing the words in the mortagage, would, as a matter

of fact, enable the defendant to escape conviction, but as a matter of law it certainly would not. You must use your own judgment as to the prosecution and determine for yourself whether or not the evidence surrounding the case justifies you in commencing the prosecution.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 9, 1897.

Hon. Otto Mutz, Chairman Legislative Investigating Committee.

Dear Senator: Yours of October 1st was duly received in which you ask this question:

"Would the Commissioner of Public Lands and Buildings or any subordinate officer in his office have a legal right under section 5, article 6, statutes of 1895 or any other law to collect fees for making and certifying field notes, maps, charts, or records and appropriate the same to his individual use and benefit?"

My answer is that he would not. The work described was done by the Commissioner or in his name as official work. Whatever fees were received by him or his subordinates for doing that work belong to the State of Nebraska.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Oct. 16, 1897.

F. D. Hunker, Esq., County Attorney, West Point, Neb.

My Dear Sir: Yours of the 13th was duly received, but owing to the engagement of the entire office force in the trial of Bartley's bondmen at Omaha was not an-

swered before, nor am I now prepared owing to the continued engagement in the same case to give you a final opinion with reference to your question. It is my impression, however, that the party polling the highest vote in the County for the head of the state ticket is entitled to have its ballot on the left hand side of the ticket. This I base upon the theory that the arrangement of the ballot is vested in the County Clerks and that in determining how it shall be arranged they are to have reference only to the conditions existing in their county.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Oct. 25, 1897.

F. W. Boggs, Esq., County Attorney, Spencer, Neb.

My Dear Sir: Your favor of October 15th was duly received at this office. The great press of other official business has prevented answering the same at an earlier date. You are respectfully advised that, in the opinion of this department, both of your questions should be answered in the affirmative. The County Treasurer is required to receive road receipts and the receipts of the Overseers of Highways the same as money. They are accounted for by him the same as money, and we see no reason why he should not be entitled to a commission on the same. This commission should be paid out of the road fund, that being the tax in payment of which the receipts are received. You are further advised that, in the opinion of this department, the county treasurer should be allowed a commission on taxes paid to him under protest. The County Treasurer is not vested with authority to determine whether or not these taxes are legal or illegal. It is his business to collect the tax, and if necessary to sell the property of the individual in order to make the collection it is his duty to do so. Such

being the case the Treasurer should be allowed a commission on the amount so collected by him. This commission should be paid out of the same fund as that in which the tax goes when it is paid. The fact that the County Board may subsequently refund this tax to the party paying the same, a matter over which the Treasurer exercises no control whatever, should not operate to defeat the Treasurer of his commission for collecting the same.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 28, 1897.

Henry H. Barth, Esq., Vice President, Board of Examiners, Nebraska State Board of Pharmacy, 920 O Street, Lincoln, Neb.

My Dear Sir: In behalf of the Board of Examiners, you ask whether or not the sale by wholesale merchants and grocers to retail merchants and by retail grocers and merchants to the public of Paris green, poisoned fly paper, blue vitrol, copperas, sulphur, salt petre, alum or ammonia, is in violation of the law regulating the practice of pharmacy and the sale of poisons which took effect on March 24, 1897. My answer is:

1. In so far as any of these articles fall within the description of drugs, poisons or medicines it is a violation of law for any retail grocer or merchant, or any person or corporation to sell the same to the public, unless done in and under the supervision of a registered pharmacist. The law, however, ought not to be so construed as to make it obnoxious to the public. Retail merchants should not, in my judgment, be complained against for selling sulphur or alum or articles of any description, simply because they might be called drugs.

2. The law does not prohibit wholesale merchants from selling the articles named in your letter to retail merchants.

You propound another question, which is substantially: Are persons who are not registered pharmacists, but who own drug stores entitled to receive a druggists liquor permit, or should the permit be issued to the registered pharmacist in charge of the drug store? The liquor law, commonly denominated the Slocum law, was passed years before the law regulating the practice of pharmacy. In the former law the word "druggist" was in my opinion, used in its popular sense, meaning a person owning and conducting a drug store and, therefore, that the intention of the law was that the permit should go to him and not to the registered pharmacist whom he might have employed as a clerk in the store.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Oct. 29, 1897.

Hon. Silas A. Holcomb, Governor.

Dear Governor: Yours of recent date with respect to issuing commissions to the graduates of Doane College who were officers of the Doane College Cadets at the time of their graduation in June, 1897, was duly received. The question propounded calls for a construction of section 1 of chapter 51, being "An act to provide for commissioning of the graduate officers of the Doane College Cadets," passed in 1897, and took effect July 10, 1897. The law provides inter alia that all persons holding appointments of the Commandant of the Military Department of Doane College as officers of the Cadet Battalion at the time of graduation from the college between and including the ranks of Second Lieutenant and Captain shall be certified with their proper rank to the Governor of the State by the

Military officer in charge and the President of said Doane College, and thereupon the Governor is authorized and directed to issue his commission in due form to all such persons so certified to him. All persons so commissioned by the Governor shall hold their commissions as retired officers of the Doane College Cadets.

1. The persons for whom commissions are asked held the appointments described in the act at the time of their graduation in June.

2. They were properly certified to the Governor.

When they graduated the law was not in force. If the law applies to them it also applies to the graduate officers of the year before, and if it is your duty to issue commissions to the young men who graduated this year it would be equally your duty to issue the commissions upon receiving the proper certificates to the graduate officers of the year before. I do not think that the law was intended to have a retroactive effect, and therefore, I do not think that the young gentlemen named in the certificate sent to the Adjutant General under date of July 1st are entitled to receive their commissions under the law.

You state that it is claimed that the law applies to the graduates of this year because they continue to hold their commissions as officers of the Cadets until the first of September, 1897. This, in my opinion, makes no difference. It is not made one of the conditions upon which the commissions shall issue. On the contrary it is clearly the intent of the law that those to whom such commissions are issued shall not continue as officers of the Cadets for it is provided that they "shall hold their commissions as retired officers of the Doane College Cadets."

Respectfully submitted,

C. J. SMYTH,

Attorney General.

Lincoln, Neb., Nov. 3, 1897.

C. C. Pool, Esq., Deputy Auditor of Public Accounts.

My Dear Sir: Yours of recent date with two enclosures from Hon. Robert W. Furnas, Secretary of the State Board of Agriculture, was duly received. In it you inquire, "Is the appropriation of $2,000 for the support of the Nebraska State Board of Agriculture for the year 1898 available if the State Board do not hold an annual fair?"

The language of the appropriation Act is, "The support of the State Board of Agriculture, $4,000." This appropriation was not made on condition that the Board hold a State Fair. The only condition, in my opinion, upon which it was made is that it be used for the support of the State Board of Agriculture. The use of it for the purpose of paying premiums on Nebraska Agricultural products, exhibited at the Trans-Mississippi Exposition would, in my opinion, be a use of it within the meaning of the statute.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Nov. 3, 1897.

J. M. Day, Esq., County Attorney, Aurora, Neb.

My Dear Sir: Yours of October 29th making certain inquiries with reference to taxes paid to the County Treasurer under the void high school law was duly received. I think this tax falls under the second subdivision of section 144, chapter 77, of the revenue law. That being so the person who paid the tax must within thirty days after such payment demand the same in writing from the Treasurer of the county. If not refunded by the Treasurer within ninety days after the demand suit may be brought against the county, etc. I take it that if the

demand is not made within thirty days, then the right of the person who paid the tax to have it refunded is gone. In that event the money remains in the treasury and should be applied for the purposes for which it was paid, to-wit: The suport of the high schools. There is nothing in the second subdivision of section 144, which provides what shall be done with the money, where it is held that the money was properly paid or where the demand was made for it within the time, but I am of the opinion that under the first subdivision, as well as from the reason of the case the money should be used the same as if the law had not been declared unconstitutional.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Nov. 5, 1897.

Samuel Lichty, Esq., Insurance Deputy, Auditor of Public Accounts.

My Dear Sir: Yours of recent date with respect to the communication received from the Trans-Mississippi Insurance Company of Omaha was duly received. In it you ask for the opinion of this office upon the question: "Can a mutual insurance company organized under the law passed in 1873 issue a nonassessible insurance policy?"

The law so far as it bears upon this subject may be summarized as follows: Section 3, chapter 33 provides that no company doing business on the plan of mutual insurance shall commence business until agreements have been entered into for insurance with at least 200 applicants, the premiums upon which shall amount to not less than $25,000, on which at least $5,000 shall have been paid in actual cash and for the remainder of which notes of solvent parties founded upon actual bona fide

applications for insurance shall have been received. No note shall amount to more than $500, and no two thereof shall be given for the same risk. Each of said notes shall be payable in whole or in part at any time when the directors shall deem the same requisite for the payment of losses, etc., and no such note shall be surrendered while the policy for which it was given continues in force. Section 17 of the same chapter provides that all such notes shall remain as security for all losses and claims until the accumulated profits invested as required by the 6th section of the act shall equal the amount of cash capital required to be possessed by stock companies organized under this act, the liability of each note decreasing proportionately as the profits are accumulated.

These provisions, as I conceive them, provide for the formation of the reserve fund or capital of the company. It is then provided in the same section: "The directors or trustees of any such company shall have the right to determine the amount of the note to be given in addition to the cash premium by any person insured in such company, and every person effecting insurance in any mutual company, and also their heirs, executors, administrator and assigns continuing to be so insured, shall thereby become members of said company during the period of the insurance and shall be bound to pay for losses and such necessary expenses as aforesaid accruing to said company in proportion to the amount of his or their deposit note or notes."

This provision, it seems to me, settles the question propounded by you. The language is, that every person effecting insurance in any mutual company, etc., shall be bound to pay for losses, etc., in proportion to the amount of his or their deposit note or notes. This being the law and the company's right to do business being fixed by the law the company, in my opinion, has no right to issue a

policy which would be nonassessable. To do so would be to do that which the law, in effect, says shall not be done. This position finds strong support in the provisions of section 18. It is there provided that the directors shall, as often as they deem necessary, settle and determine the sums to be paid by the several members thereof as their respective portions of the losses sustained, and that the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, and no member shall ever be required to pay for any loss more than the amount of his deposit note or notes. Under all the authorities every person insured in a mutual insurance company becomes a member of that company. The person to whom a nonassessable policy was issued by the Trans-Mississippi Co. became therefore, a member of that company. The section of the statute just quoted says that each member shall always pay in proportion to the original amount of his deposit note or notes, but the Company has entered into an agreement with a member holding a nonassessable policy that he shall not pay in proportion to the amount of his deposit note or notes, and hence, the company made an agreement directly in the face of the statute.

I have examined carefully the authorities presented by Mr. Baldrige, through the Trans-Mississippi Company. In none of them was the Court called upon to construe a statute similar to ours. Davis vs. Oskosh, 52 N. W., 777, is a case in which the action was for assessments levied upon the deposit notes. The defense was that because section 15 of the articles of organization provided that "any person applying for insurance, so electing, may pay a definite sum in money to be fixed by said corporation in full for said insurance, in lieu of the premium note. The company was a stock company and not a mutual company, and hence that it had no authority to do busi-

ness as a mutual company. The Court in passing upon this defense said: "The articles of association seem to be entirely consistent with the statute, and further that the statutes contain but few specific provisions for the government of mutual companies, but in the main leave them to pursue their business as they please." It appears in that case that there was no conflict between the statute and the articles of incorporation, and that the only question for the Court to determine was whether or not a company calling itself mutual could do business under section 15, by me quoted above. The Court held that it could and said: "It surely cannot alter the principle that the insured instead of depositing his note with the company pays into its treasury the amount for which the note otherwise would have been given." But that case is not in any sense, it seems to me, similar to the one presented by the Trans-Mississippi people. In it the law did not require notes to be taken. In this it does. In that the articles of incorporation of the company provided they might accept money in lieu of the note. In this they do not pretend to have accepted money in lieu of the note. Given vs. Rettew, 29 At., 703, is a case in which the action was to recover an assessment levied against Rettew's policy. He paid the premium required by the company. There was nothing in his policy and nothing in the law, so far as the case discloses, requiring him to pay assessments. The plaintiff put his right to recover against Rettew on a by-law of the company of which the Court held the defendant had no knowledge either actual or constructive at the time he entered into his contract. That being so of course it did not bind him. The argument that the company had no authority to issue such a policy as the one which it had issued to Rettew rested entirely upon the provision of the law that a company must be organized either as a stock company or as a mutual com-

pany. The Court held on general principles of law that a mutual company might issue such a policy as that which it had issued to Rettew, but what a mutual company might do under general principles of law is, I conceive it, quite a different proposition from what it might do under a statute such as ours. May on Insurance, Schumpf vs. Insurance Co., 86 Penn. St., 373, proceed under substantially the same grounds as the two cases just examined.

The company did not favor you with the reasoning of Mr. Baldrige, upon which he bases the conclusions which the Company have communicated to you. I wish the Company had done so, because it would have been of much assistance to me in my examination, holding, as I do, Mr. Baldrige's opinion as a lawyer in very high esteem. As it is I cannot accept his conclusions, and must hold that the policy issued by the Company is not in compliance with the law.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 2, 1897.

Hon. J. M. Day, County Attorney, Aurora, Neb.

Dear Sir: Your letter of November 25th has been duly received at this office. You are probably aware that the bill providing for the bonding of county officers by surety companies failed to pass and therefore that it could not supersede any former statute relating to the same question. The question has been before this office at various times, inquiries similar to this being received almost daily from officers throughout the state. We here respectfully advise that in our opinion the Board of County Commissioners or Board of Supervisors of your county could not be compelled to accept a bond signed

by a surety company alone. Section 9, chapter 10 of our statute provides that all official bonds of county officers shall be executed by the principal and at least two sufficient sureties who shall be freeholders of the county in which such bonds are given. If a bond were accepted by a county board signed by a surety company I do not think there could be any question raised as to the validity of the bond. The provision of the statute above referred to is for the benefit and protection of the county and not for the benefit of the surety on the bond, and if the party holding the office under and by virtue of a bond signed by a surety company alone, that company could never be heard to say that the bond was illegal. But if the county board should refuse to approve the bond or the present treasurer should refuse to turn the office over to him, he having given a bond signed by a surety company alone, I doubt very much that mandamus proceedings would lie to compel the county board to approve the bond or to compel the present treasurer to turn the office over to him. These bonds are accepted in many counties in the state and are the best bonds given. But as above indicated, the county board could probably refuse to accept it or the present treasurer might refuse to turn the office over if that were the only official bond given.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 7, 1897.

Mr. M. H. Fleming, County Attorney, Crete, Neb.

Dear Sir: Your letter of recent date was duly received in which you inquire whether or not in the opinion of this office the County Judge of your county is entitled to any compensation for the services performed by him appointing Judges and Clerks of election, there being no statute providing for such compensation.

I am of the opinion that he is not. The right of a public officer to compensation is a creature of statute and does not arise by reason of contract. Those "who accept public offices which require them to render services to the state, must take the office cum onere. The rendition of such service is gratutious unless by express statutory provision compensation is fixed, and an express liability for its payment imposed on the state." State vs. Brewer, 59 Ala., 131.

A promise to pay an officer an extra fee or sum beyond that fixed by law, is not binding, though he renders services and exercises a degree of diligence greater than could legally have been required of him." Decatur vs. Vermillion, 77 Ill., 316.

This case is to the point, that the public authorities cannot make even a binding contract to pay an officer for services which the law does not provide any compensation for—that the officer must perform not only the duties attached to his office when accepting the same, but any additional duties which may be imposed by lawful authority without additional compensation unless the same is provided for by statute. To the same effect is Sidway vs. Commissioners, 130 Ill., 496.

In Sampson vs. Rochester, 60 N. H., 477, a person was appointed as a police officer and he accepted the appointment. The statute provided that police officers should receive such compensation as might be voted by the town. No compensation was voted for the officer; he sued for the value of his services. The court held that he could not recover. This is in line with the Alabama case, supra, which holds that the services of an officer are gratuitous unless the compensation is fixed by statute. In other words that right cannot rest either in an express or an implied contract, it rests entirely on the statute.

In State vs. Silver, 9 Neb., 85, the Supreme court of

this state said: "A public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute." To the same effect is Bayha vs. Webster County, 18 Neb.,, 131. In Heald vs. Polk County, 46 Neb., 28, the Court said: "When the law prescribes the duties of a public officer and fixes the compensation of such officer, he must perform the duties required of him by the law for such compensation."

It is true that in neither of these cases was the exact question presented by your inquiry before the Court, but I take it the principle decided by them is identical with the principle that must control with respect to your inquiry. It is conceded that there is no provision of the statute authorizing the payment of any fees to the County Judge for services rendered in appointing Judges and Clerks of election. The right, therefore, if any, of these officers to fees must arise, if at all, from an implied contract on the part of the county to pay for the additional services required by the state. It is upon this theory, as I understand it, that the Judges base their claim. They say that because they were by the state required to perform these services there is an impled contract to pay them the reasonable value of the services. As we have seen, their theory is not sound because so far as my inquiries have gone all the authorities are to the effect that the right of a public officer to compensation is never the creature of contract, but arises, if it arises at all, from the statute.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 6, 1897.

Mr. George C. Gillan, County Attorney, Lexington, Neb.

Dear Sir: Your letter of recent date was duly received in which you inquire whether or not in the opinion of this office the County Judge of your county is entitled to any compensation for the services performed by him in appointing judges and clerks of election, there being no statute providing for such compensation.

I am of the opinion that he is not. The right of a public officer to compensation is a creature of statute and does not arise by reason of contract. Those "who accept public offices which requires them to render services to the state, must take the office cum onere. The rendition of such service is gratutious unless by express statutory provision compensation is fixed, and express liability for its payment imposed on the state." State vs. Brewer, 59 Ala., 131.

"A promise to pay an officer an extra fee or sum beyond that fixed by law, is not binding, though he renders services and exercises a degree of diligence greater than could legally have been required of him.' Decature vs. Vermillion, 77 Ill., 316.

This case is to the point, that the public authorities cannot make even a binding contract to pay an officer for services which the law does not provide any compensation for—that the officer must perform not only the duties attached to his office when accepting the same but any additional duties which may be imposed by lawful authority without additional compensation unless the same is provided for by statute. To the same effect is Sidway vs. Commissioners, 120 Ill., 496.

In Sampson vs. Rochester, 60 N. H., 477, a person was appointed as a police officer and he accepted the appointment. The statute provided that police officers should receive such compensation as might be voted by the town.

No compensation was voted for this officer; he sued for the value of his services. The Court held that he could not recover. This is in line with the Alabama case, supra, which holds that the services of an officer are gratuitous unless the compensation is fixed by statute." In other words that right cannot rest either in an express or an implied contract; it rests entirely on the statute.

In State vs. Silver, 9 Neb., 85, the Supreme Court of this state said: "A public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute." To the same effect is Bayha vs. Webster County, 18 Neb., 131. In Heald vs. Polk County, 46 Neb., 128, the court said: "When the law prescribes the duties of a public officer and fixes the compensation of such officer, he must perform the duties required of him by the law for such compensation."

It is true that in neither of these cases was the exact question presented by your inquiry before the Court, but I take it the principle decided by them is identical with the principle that must control with respect to your inquiry. It is conceded that there is no provision of the statute authorizing the payment of any fees to the County Judge for services rendered in appointing judges and clerks of election. The right, therefore, if any, of those officers to fees must arise, if at all, from an implied contract on the part of the County to pay for the additional services required by the state. It is upon this theory, as I understand it, that the judges base their claim. They say that because they were by the state required to perform these services there is an implied contract to pay them the reasonable value of the services. As we have seen, their theory is not sound because so far as my inquiries have gone all the authorities are to the effect

that the right of a public officer to compensation is never the creature of contract, but arises, if it arises at all, from the statute.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 8, 1897.

Mr. J. M. Curry, Pender, Neb.

Dear Sir: Answering your favor of recent date addressed to the Attorney General you are respectfully advised that if the county board authorizes the County Judge to appoint a clerk, he may lawfully do so irrespective of the population of the County. The statute to which you refer makes it mandatory upon the county Board to furnish this clerk in counties having populations of more than 25,000; in counties having less than that the matter is left discretionary with the County Board.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb. Dec. 8, 1897.

Mr. J. R. Swain, Greeley, Neb.

Dear Sir: You will pardon the delay in answering your letter but, the great amount of business has caused it.

The matter of bonds for County officers has received attention in this office and the opinion we have come to is, that the County Board connot be compelled to accept a bond signed by a surety company alone, but if such board accept a bond signed by a surety company, the bond would be legal and binding on the surety company.

The county treasurer has no right to deposit money in any bank, until that bank has given a bond required

by statute, and had the same approved by the County Board. The County Board is not authorized to accept a bond unless it provide for the payment of interest as provided in the depository law. If the treasurer deposits this money in a bank without the depository bond being given and approved by the Board, the treasurer and his bondsmen would be liable for this money. The County Board has no right to designate a bank as a county depository, unless such bank has given the bond provided for in the depository law. If the Board should designate a bank which has failed to give a bond, that would be no protection to the County Treasurer and his bondsmen if money is lost therein.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Dec. 8, 1897.

Mr. Samuel Rinaker, County Attorney, Beatrice, Neb.

Dear Sir: In the matter of official bonds for county officers referred to in your favor of November 24th, you are respectfully advised that in the opinion of this office the county board should not be compelled to accept a bond signed by a surety company alone. Our statute provides that county officers shall give a bond signed by at least two free holders who are residents of such county. This provision is no doubt made for the protection of the county and might be waived by the county board; but if the county board should refuse to approve a bond signed by a surety company alone we do not believe mandamus proceedings would lie to compel the board to approve such bond. If such bond were accepted however, and the party held office thereunder the surety would never be

heard to question the liability on the bond. We are not of the opinion that any liability would attach to the County Judge and his bondsmen in case he approved an official bond signed by a surety company alone.

In order to avoid all possible question the bond should be signed by two free holders together with the surety company.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Dec. 8, 1897.

Mr. Grant Guthrie, County Attorney, Harrison, Neb.

Dear Sir: Answering your favor of recent date addressed to the Attorney General you are respectfully advised that in our opinion fees should be computed on the total amount collected during the year irrespective of the years for which the taxes thus collected were levied.

Second—The tax should be collected at the end of each year and the fees computed on the amount collected. The statute contemplates he shall receive so much per annum, and not per term.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Dec. 8, 1897.

Mr. A. J. Shafer, County Attorney, Holdrege, Neb.

Dear Sir: Your letter of the 3d with reference to accepting surety companies on the bonds of county of-

ficers has been duly received. I am not acquainted with the financial standing of the Fidelity Deposit Company of Maryland.

You are respectfully advised that in the opinion of this office the county board could not be compelled to accept a bond signed by a surety company alone. Our statute provides that county officers shall give a bond signed by at least, two free holders who are residents of such county. This provision is no doubt made for the protection of the county, and might be waived by the county board; but if the county board should refuse to approve a bond signed by a surety company alone we do not believe mandamus proceedings would lie to compel the board to approve such bond. If such bond were accepted, however, and the party held office thereunder the surety would never be heard to question the liability on the bond. We are not of the opinion that any liability would attach to the county judge and his bondsmen in case he approved an official bond signed by a surety company alone. In order to avoid all possible question the bond should be signed by two free holders together with the surety company.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 10, 1897.

Mr. J. G. Thompson, Alma, Neb.

Dear Sir: Answering your favor of December 8th addressed to the Attorney General, you are respectfully advised that, in the opinion of this office, the county is not liable for the defendant's witnesses, where he has not filed an affidavit that he is unable to procure his own witnesses. That section of our statute would have no meaning at all if the county is liable for his witnesses,

where no affidavit is filed, the same as it would be if it were filed.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Dec. 10, 1897.

Mr. J. F. Ekeroth, County Clerk, Ponca, Neb.

Dear Sir: Answering your favor of December 8th you are respectfully advised that in the opinion of this office, the County Board cannot be compelled to approve a bond signed by a surety company alone, but, if such bond were accepted by the County Board it would be a valid bond. Our statute seems to contemplate that bonds of county officials shall be signed by at least two resident free holders. The County Board might be justified in refusing to approve a bond where the same was not signed by these free holders. But, this provision is for the benefit of the county and if the County Board sees fit to waive this provision and accept the bond signed by the surety company alone the company would never be heard to urge that the bond was not a legal and binding obligation.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Dec. 13, 1897.

Hon. J. R. Rhodes, County Judge, Broken Bow, Neb.

Dear Sir: Your letter of December 9th, with reference to the opinion given by this office, touching the right of County Judges to receive from the counties compensa-

tion for the services performed by them in appointing judges and clerks of election, there being no statute providing for such compensation, was received. I was not asked to say whether there was a statute providing for such compensation, and hence did not examine the question. My opinion was based upon the theory that there is no statute covering the subject. The cases to which you have called my attention are familiar to me, but, I do not think they hold against the view I have expressed. In both of these cases the question was, whether or not were public officials had by virtue of, or under guise of their office collected fees for official or semi-official acts, they were required to account for those fees to the county board. In the course of his opinion in the case of State vs. Allen, Justice Cobb takes occasion to say: "Is it possible that in all such cases the services for which no fee is prescribed, whatever may be its nature, is voluntary and unofficial on the part of the individual holding the office, which he may render or refuse at his pleasure? I think not." In this Justice Cobb was quite correct. The fact that no fee is prescribed for a duty fixed by statute, is no evidence that the duty is not an official one, and one which the officer can be compelled to perform.

In State vs. Kelly, 30 Neb., 577, Justice Norval, in discussing the question propounded by Justice Cobb, said: "The duty of a public officer to perform a particular act does not depend upon whether the legislature has prescribed the remumeration he shall charge therefor but rather, whether the law in express terms or by implication makes it his official duty to render such services. This being so the public officer could be compelled to perform a duty imposed by statute, although there was no fee prescribed for the services to be rendered in the performance of the duty." To this extent Judge Norval and Justice Cobb do not appear to agree, for Justice Cobb

said in State vs. Allen, that "the officers could not reasonably be required to perform gratuitously" any duty imposed by statute.

In the opinion from which I have just quoted, Justice Cobb also stated, that in his opinion a public officer could demand fees for official services where the amount thereof were not prescribed by statute. That may be true but it does not meet the question which we are now dealing with, and that is, whether or not, when he has performed the services for the individual he can then ask the county to pay for those services, there being no statute authorizing the county to make such payment. A careful examination of the text books and the authorities confirm me in the opinion heretofore given out from this office with respect to this matter.

With the justice of this rule, I of course have nothing to do. It is my opinion, however, that the county judges should according to the canons of fair dealing be paid a reasonable compensation for the services. No man should be asked to work without compensation and certainly the county or state should not compel any man to perform a service without remunerating him therefor.

I would be glad to see every county judge in the state paid a reasonable compensation for his services and if upon full consideration the courts of the state hold that I am wrong in my interpretation of the law, I shall feel no regret but would rather rejoice. In the meantime, however, I must adhere to what I conscientiously believe to be the law.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 20, 1897.

Mr. W. R. Butler, County Attorney, O'Neill, Neb.

Dear Sir: Yours of the 18th containing three questions was duly received. I state the questions and answer them in the order in which they have been submitted.

1. Can a county treasurer in this state, give a security bond that a county board should approve?

A. I think so. If you mean to ask by this question, whether or not the county treasurer can compel the county board to accept a security company bond, my impression is that he cannot. I say, impression because I have not fully satisfied myself that section 188a chapter 16, is unconstitutional, although I have a strong impression that it is. It provides substantially that in cases where by the laws of the state official bonds with two or more sureties are required it shall be sufficient to give a bond executed by a corporation duly organized, etc. This would seem to indicate that section 188a was an amendment of all the provisions of the statute with reference to the number of sureties required on official bonds, and since the section does not in any way refer to those provisions, and is not complete in itself, I believe from my limited investigation of the subject the courts would hold the section unconstitutional.

2. You ask, "If a security company bond is a legal bond for a county treasurer, can the treasurer give a bond for $100,000.00 signed by residents of the county and also give a security company bond for $100,000.00 lawfully?"

A. The security company bond may be a legal bond yet not one which the board could be compelled to accept, nor even one which would qualify the treasurer. Keeping this distinction in mind I answer that whether or not such a bond is one that the county commissioners may be compelled to accept, I am clearly of the opinion that if they did accept it, and it is properly conditioned

that it would be absolutely good as a protection against any default of the treasurer. I am also of the opinion that it would be good if in addition to it you take a bond signed by residents of your county.

3. You ask, "Suppose a security company should waive any irregularity of the statute in regard to securities on official bonds, what effect would this waiver have in case of a suit on a shortage?"

A. My opinion is that such a suit could be maintained and recovery had from the security company.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 20, 1897.

Mr. A. D. Ranney, County Attorney, Webser County, Blue Hill, Neb.

Dear Sir: I am in receipt of yours of the 17th, in which you propound two questions. One with respect to the power of the county treasurer elect to compel the board of county commissioners to approve his surety bond as his official bond, and the other with respect to the situation of your county, in view of the efforts made to change from township organization and the litigation that arose out of these efforts. The first question I answer now, the other one I will have to give considerable attention to and hence, will require a little more time.

My understanding of the law is that the county treasurer cannot qualify by giving the bond of the surety company, and the board of county commissioners cannot be compelled to approve such a bond. Section 9 of chapter 10, of the Revised Statutes of 1897 provides that all official bonds of county officers shall be executed by the principal named in such bond and at least two sufficient

sureties, who shall be free holders of the county in which said bonds are given. Section 188 of the same statute provides that whenever any bond for the faithful performance of any duty is by the laws required to be given with two or more sureties, the execution of the same should be sufficient when sureties are guaranted solely by a corporation, etc." If this section is valid then of course I am wrong in the opinion expressed above, but, while not expressing any fixed opinion as to whether that section is constitutional or not I have a very strong impression that it is amendatory of section 9 chapter 10, and since it does not comply with the provision of the constitution with respect to amendments, and since it is not complete within itself, for it refers not only to section 9 aforesaid, but to all parts of the statute which deal with official bonds, it is not constitutional. I am firmly of the opinion however, that if the county board should take such a bond, it being properly conditioned, the surety company would be held for any default of the treasurer.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 20, 1897.

Hon. Otto Mutz, Chairman Legislative Investigating Committee, Lincoln, Neb.

Dear Sir: Answering your two favors of December 18th addressed to the Attorney General, you are respectfully advised:

1. We are unable to find where the Supreme Court of this state has ever passed upon section 33, chapter 86 of the Compiled Statutes of 1895. This section is very uncertain in its meaning, but we are of the opinion the legislature intended the officers should be paid five cents per mile for the total number of miles traveled.

2. There does not seem to be any room for construction of section 5, chapter 28, Compiled Statutes of 1895. The language quoted in our law is very plain, and we know of no law authorizing a greater charge than seventy-five cents per day for six days, or $3.50 per week for more than six days. If there is any law authorizing a greater charge the sheriff should be able to point it out.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 24, 1897.

Mr. Phillip Marshall, Benkleman, Neb.

Dear Sir: Your letter of December 22d asking when, in the opinion of this department, county officers should qualify and fill their respective stations, has been duly received.

The first part of your question is not an open one in this state; the constitution clearly fixes the time when the term of all the county officers should commence as the first Thursday after the first Tuesday in January next succeeding their election. The statute requires that the official bond of the county treasurer shall be filed in the office of the county clerk on or before the first Thursday after the first Tuesday in January. The statute and also the decisions of the Supreme Court imposes the duty on the officer elect to have his official bond approved by the proper officers and filed for record not later than the firstThursday after the first Tuesday in January. This is a duty which the law imposes upon you in this case; you are required to have your bond properly executed, submitted to the county board, approved and filed for record on or before the above mentioned date. This is necessary to establish your right to claim the office to which you have been elected, and you should see to it that a

good and sufficient bond with the proper conditions and sufficient in amount, executed by sufficient sureties is filed with the county clerk, and that, if necessary a special meeting of the county board be held to act upon the bond. If this is not done, under the strict letter of the law you forfeit your right to claim the office.

The question as to whether the act of approval of the bond as late as January 11th, can relate back to the filing on or before the first Tuesday, is still an open question in this state. You should take the matter up with the county attorney of your county, and if possible procure a special meeting of the county board in time to approve your bond on or before the first Thursday after the first Tuesday in January. This is the only safe course for you to pursue, if you desire to assert your right to hold the office. Consult the county attorney and probably he will give you all the information necessary.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 27, 1897,

Mr. C. P. Logan, County Attorney, Grant, Neb.

Dear Sir: I have your favor of the 24th, in which you ask for my opinion on the following question: "This county has been in the habit of levying a tax, by virtue of the provisions of section 77 of the Revenue Laws of a certain number of mills, within the four mill limit," for "county bridge fund." It is a well known fact that there are no bridges in the county and no running streams requiring bridges. It was the intention of the county commissioners when making the levy to transfer the proceeds thereof to the general fund, for the use of the county general fund purposes, not being able to raise a sufficient

amount by a levy of nine mills in the general fund to defray the actual expenses of running the county, the transfer of such bridge fund being made under authority of Sec. 4 Page 452 of 1895 statute. Is the bridge fund tax levied under such circumstances legal?"

In my opinion the bridge fund tax thus levied would not be legal. The levy under the circumstances disclosed by your statements of facts would be nothing more or less than an evasion of the statute, and would therefore, in my opinion, be a fraud on the part of the county board.

Under subdivision 6 of Sec. 25, article 1, chapter 18, of the Compiled Statutes of 1895, it is the duty of the county board at their regular meeting in January of each year to prepare an estimate of the necessary expenses of the county during the ensuing year, the total of which shall in no instance exceed the amount of tax authorized by law to be levied during that year. And it is further provided that such estimate shall contain the items constituting the amounts and that the levy shall not be made in excess of such estimate. But, that if it be in excess of the estimate the members of the board shall be jointly and severally liable upon their official bonds etc. It is then the duty of the board to estimate, at their first meeting in January, the amount of money necessary to maintain the bridges of the county, and the amount levied for that purpose should not exceed the estimate.

If the board declares in their estimate that a certain sum is necessary for the bridge fund when it knows that such sum is not necessary, and when such declaration is made, not for the purpose of complying with the law, but for the purpose of defeating it, the board would be acting fraudulently and I believe that any tax payer could restrain the collection of a tax thus levied—not the whole tax of course but that part of the tax levied for the bridge fund.

This does not mean that if there is any sum whatever necessary for the legitimate purpose of the bridge fund, the board would not have the right to levy any sum within the limits fixed by the law. In such case the amount to be levied is entirely in the discretion of the board and its action in that regard would not be controlled by the court.

All this, however, is on the theory that the members of the board are acting in good faith, and not for the purpose of evading the law and violating their obligations as members of the board. Your statement of facts would in my judgment leave no room for dispute, that in such a case the board would be acting improperly and that their action could be restrained at the instance of any tax payer.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 28th, 1897.

Mr. Samuel Rinaker, County Attorney, Beatrice, Neb.

Dear Sir: I have your favor of December 23d in which you propound certain questions with reference to the depository law and the right of savings banks to become county depositories.

1. With respect to whether or not the approving board consisting of the Governor, Secetary of State and Attorney General have during the present administration designated Savings banks as state depositories, permit me to say, the board has not been called upon to do so.

2. I see nothing in the law governing depositories which is inconsistent with the law governing savings banks. The depository law requires that the money deposited shall be subject to the check or order of the treasurer at any time. The law governing savings banks

provides that no deposit shall be received or payment made unless entered in the pass book at the time such transaction is had. Between this provision and the provision just referred to in the depository law, there is in my opinion no necessary conflict. True, the treasurer cannot draw his check upon the savings bank and place it in the hands of the payee; but, he may go to the bank, present his check, draw out the money, the same as any other depositor, and have the amount drawn out entered upon his bank book at the time of the transaction. This would make it inconvenient for the treasurer, but that would not of course, affect the right of the savings bank to become a depository. True, such a bank could not become a depository while its by-laws provided that the bank might require of the treasurer sixty days notice before paying his check or order: But I see no reason why the bank may not modify its by-laws so as to make its obligation to pay the check upon demand absolute, and thus bring its by-laws into harmony with the provisions of the depository laws.

3. If I am correct in the opinion just expressed in the second subdivision of this letter then of course it would follow that savings banks which have given or which may give a depository bond would be liable on that bond for any money received from the county.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 25th, 1898.

Mr. W. M. Cain, County Attorney, David City, Neb.

Dear Sir: We have examined the matter referred to in your favor of January 22d, and are unable to see any distinction between your case and the case of Heald vs. Polk county, 46 Neb. 28. It appears in your case that the

County Board never made any provision by resolution, for the payment of the clerk's services as clerk of the County Board. The County Board under the statute has the right to fix his salary at not to exceed $400, per annum for this work. And if the same has been done then when the amount was received by the clerk, it would be his duty to enter the same upon the fee book. If the county board made no provision for him whatever in that regard, it would be his duty to act as clerk of the board without any compensation therefor. This is one of the duties enjoined upon his as County Clerk, and he must perform the same whether the board allows him compensation therefor or not.

It appears that Mr. Diefendorf filed claims before the board, a part of which was for clerk of the County Board, and the amount thus allowed being $200 each year, was entered on the fee book; since that amount was entered by him on his fee book, it need not be taken into consideration in this case.

The question is as to the $200 per annum which was allowed him for extra services. Your letter states, and the copies of claims sent by you show, that in January 1895, February 1896, and in January 1897 he filed claims before the Board in each case for $200, the claim being, "to extra services rendered the County of Butler as Clerk of the Board of Supervisors." It appears that each of these claims was allowed by the County Board, warrants drawn for the same, and the same collected by the Clerk. That the County Board has NO RIGHT to allow these claims will not be disputed. The claims were not legal claims and the county board were not justified in paying the same. But as stated before we are unable to distinguish this case from the Polk County case; and in that case the Supreme Court held that recovery could not be

had where a claim had been allowed and no appeal taken therefrom.

As to the claims now on file, if the same are allowed, he should be required to place the same upon the fee book. I understand from your letter that even in allowing Deifendorf with this $600, he still has money in his hands to turn over to the county, without taking into account the claims on file with the Board and which have not been acted on. Such being the case it can make but little difference to him or to the County whether these claims are allowed or disallowed; if allowed they should be placed on the fee book, and that would simply increase the amount which he must turn over to the county; but as to the $600 allowed him one, two, three years ago, we believe that under the decisions of our Supreme Court in the Polk County case, he can neither be required to place it on the fee book nor can the county recover it from him.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 18, 1898.

Mr. John Tongue, County Attorney, Stromsburg, Neb.

Dear Sir: Answering your favor of January 15th, you are respectfully advised that under the facts stated in your letter there can be no question of the right of this person to the office of County Judge. Your letter states that he first filed his official bond with the County Clerk, December 30th, 1897, and took his oath of office. The commissioners met on Wednesday, January 5th, but did not approve his bond. On Thursday, January 6th, he procured two additional signers and on that day the com-

missioners again met at the call of the County Clerk and approved his bond. Your letter then states that the County Board again approved the bond January 14th. The law required that the officer shall have his bond filed and approved on or before the first Thursday after the first Tuesday in January next following his election. If this party had his bond filed and approved on Thursday, January 6th, it would seem that he has fully complied with the law in all respects. The fact that the county commissioners again approved the bond on January 14th, would seem neither to add nor take from the force and effect of his bond. If nothing had been done by the County Board until January 14th, a different question might arise.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 11, 1898.

Allen T. Rector, Esq., Omaha, Neb.

Dear Sir: I have your favor of January 10th making certain inquiries with respect to the meaning of certain provisions of section 40, chapter 43 of the Compiled Statutes. Permit me to say in response thereto, that in my judgment, the provisions referred to leave no room for construction—they are plain.

1. Your association must not receive premiums; that is you cannot engage in a profit making business.

2. You cannot pay more than two dollars per day to any of your officers, and you can pay only for such days or part of days as the officers are actually employed in the work of the association.

3. You shall not hire any clerks or solicitors. Un-

der this provision, I think you could have as many officers as may be necessary to perform the work of the association, but no one officer shall receive more than two dollars per day from the association.

4. You are permitted to levy and collect from your members a sufficient amount of money to pay for any losses which any of your members may sustain by reason of the destruction by fire of any of his property insured in your association, and to pay all expenses incurred by your association on account of salaries paid to officers thereof.

This amount of money may be collected in such sums as you may determine upon and may be payable as you may determine upon. I do not think it is necessary to wait until the loss has occurred or the expenses have been incurred before making the levy, and collecting the money. The thing which the law is intended to guard against in that respect is the making of profit by the association.

Hoping that this meets the difficulties which occurred to you, I remain ready to serve you at any time.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 3, 1898.

Mr. J. E. Thackery, County Treasurer-elect, Valentine, Neb.

Dear Sir: I have your favor of December 30th. It reached me this morning. In it you state that at the request of the County Attorney you propound the questions therein contained.

If you deposit the County money in any bank other than a duly constituted county depository, you will do it at your own risk, and no order, in my opinion, made by the

county commissioners would affect your responsibility. The board of commissioners are creatures of the law and they cannot relieve you of any responsibility, except, in the respect wherein they are given authority to do so by the statute. It would be well, however, to have their consent or their order to any act that you may do for the purpose of showing that you are acting in good faith and in accordance with the wishes of the county authorities.

If the banks of your county refuse to become county depositories, you will still be required to keep the moneys of the county safely. If no sufficient place is furnished by the county for the safe keeping of the funds then you must do the best you can. My advise would be to place the money in the banks of your county for safe keeping, on special deposit. If the banks refuse to keep it, or accept it, or if the guaranty company refuse to sign your bond, if you so deposit it, then I would advise that you place it on special deposit in an Omaha bank. I advise a special deposit, because the law is so unsettled in this state, with respect to the effect of a general deposit by a public official, that I prefer to advise you to take a course about which there can be no question, and hence, make a special deposit. The putting of the money in a bank of your county, or in an Omaha bank on special deposit would be at your risk. I would certainly advise you against holding it in an unsafe place.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 4, 1898.

W. E. Goodhue, Esq., County Attorney, Hebron, Neb.

Dear Sir: Your telegram of the 31st was not delivered at this office until yesterday. In reply to your inquiry, I will say that the bond would be binding upon the

guaranty company, and would fully protect the county against any default on the part of the county official giving the bond. It is, however, questionable whether such a bond would be sufficient to qualify the official giving it. In view of this I have advised in similar cases that at least two resident free holders be procured to sign the bond with the guaranty company in order that the provision requiring the bond to be signed by two or more free holders, will be satisfied, and would put the validity of the bond, and all acts in connection with the taking of it, beyond question, in my opinion. As a precaution it would be well to have a provision in the bond, waiving so far as the surety is concerned all failures, if any, of the bond to conform to the provisions of the statute.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 28, 1897.

Mr. Fred Nye, County Attorney, Kearney, Neb.

Dear Sir: We have under consideration the question propounded by you in the case of the State vs. Fred Y. Robertson, and the conclusion to which we have arrived is as follows:

Under sections 483 and 515 of the Criminal Code the consent of the Supreme court is necessary before the bill of exceptions or petition in error on the part of the state can be filed. If the Supreme court should sustain your contention and hold that the demurrer of the defendant to your information ought to have been overruled, they would simply make a finding to that effect, but could not reverse the judgment and send the case back for trial. If, however, after that had been done by the Supreme court you then filed another information against this same defendant charging him with the commission of

the same offense in the same language used in the present information, he could not plead the former jeopardy as a defense. The authorities seem to be all to the effect that jeopardy does not attach until the plea of not guilty has been entered, and the jury sworn to try the case. I think our Supreme Court settled that question in the case of State vs. Priebnow, 16 Neb., 131. If this mode of procedure meets with your approval you might get leave of court, when it convenes in January, and file this petition in error and if the court should sustain your view of the law governing the case you could then file a new information and bring the defendant to trial. We have made no examination of the information filed and express no opinion thereon. We have simply endeavored to determine whether or not the defendant could be prosecuted if the action of the lower court in sustaining the demurrer was reversed.

Our conclusion is that a new information could be filed under which the defendant could be placed on trial.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Dec. 29, 1897.

Mr. Hugh LaMaster, County Attorney, Tecumseh, Neb.

Dear Sir: Answering your favor of December 28th addressed to the Attorney General, you are respectfully advised that this department has uniformly advised county officers that the board of county commissioners could not be compelled to approve an official bond signed by a surety company alone, but if such bond is approved by the county commissioners, it would be a binding obligation on the surety company and neither the officer thus

giving the bond, nor the surety company signing it could ever be heard to urge that there was no liability on the bond. Our statutes seems to contemplate that the county treasurer shall give a bond signed by two free holders of the county. This provision is for the benefit of the county and not for the benefit of the sureties. If the county board sees fit to waive this provision, neither the officer nor the surety company could ever take advantage thereof. There is no doubt that the surety company bond is, as a rule, the best bond given by county officers.

We conclude that your county board had the right to approve the bond and if so approved there could be no question of its validity.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 3, 1898.

Hon. John W. Long, County Attorney, Loup City, Neb.

Dear Sir: Your favor of the 30th was received by me this morning. In it you propound two questions with respect to the validity of official bonds signed by the U. S. Fidelity and Guaranty Co. as surety.

With respect to the first question my answer is, that the bond would be binding upon the guarantee company, and would fully protect the county against any defaults upon the part of the county officials giving the bond. It is, however, questionable whether such a bond would be sufficient to qualify the official giving it. In view of this I have advised, in similar cases, that two or three resident free holders be procured to sign the bond with the guaranty company. In order that the provision requiring the bond to be signed by two or more free holders

would be satisfied, and would put the validity of the bond and all acts in connection with the taking of it, beyond question, in my opinion. As a precaution it would be well to have a provision in the bond waiving, so far as the surety is concerned, all failures if any, of the bond to conform to the provisions of the statute.

With respect to the second question it is my opinion that the guaranty company can legally become surety on the bond of the depository bank, and that as such surety would be liable.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 28, 1897.

Mr. M. D. Carey, Seward, Neb.

Dear Sir: You have asked the opinion of this office respecting the number of justices of the peace to which the several townships in a county under township organization are entitled? This matter has been considered by this office on the request of other county attorneys and the opinion to which we have arrived is, that, in townships other than those in which there are cities of the first or second class, but one justice of the peace can be elected.

Section 12 of chapter 18, of the Compiled Statutes of 1897, provides that, when township organization is first adopted the board of supervisors shall appoint the officers to which such township is entitled; and it is there stated that such board shall appoint "some suitable person, being an elector within the township, as justice of the peace." This clearly limits the township to one justice. Section 20 of the same act, provides that all township officers provided for by appointment in section 12 shall be filled at the next general election held in November fol-

lowing such appointment. Thus, it will be seen, no provision is made for electing any officers except those which may be appointed under section 12, and since section 12 limits the number of justices to one it follows there is no authority in section 20 to elect more than one.

Section 19 of the same chapter provides that the town clerk, the town assessor and the justice of the peace shall constitute the town board.

It will be noted that this section speaks of "the justice of the peace," and not justices of the peace. This clearly indicates that only one justice of the peace can act on the town board, and there is nothing in this chapter which makes provision for determining which justice shall act, if there be more than one.

You make inquiry as to the rights of two parties, each of whom has secured a certificate of election from the county clerk. If both of the parties were candidates for election at the same general election, it would be an easy matter to determine which one received the greater number of votes, and that person alone would be legally entitled to a certificate. The county clerk ought not to issue a certificate to more than one person; if he did issue a certificate to more than one, that would not constitute the person who received the smallest number of votes, a duly elected and qualified justice of the peace. If the person thus holding a certificate from the county clerk insists upon acting as a justice it might be necessary for you as county attorney to bring quo warranto proceedings to oust him from the office. I trust this gives you all the information desired, and remain,

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Dec. 28, 1897.

Mr. A. D. Ranney, County Attorney, Blue Hill, Neb.

Dear Sir: Some days ago I answered one of the questions contained in your letter of the 17th inst., and at the same time stated that later on I would examine the second question and give you my opinion with respect thereto. I have made that examination.

The township officers were all elected until their successors were elected and qualified. Section 66 of chapter 18, article 4, provides that the township organization shall cease to exist as soon as a board of county commissioners are appointed and qualified. The county board in your county was not, by reason of the injunction, appointed until last spring, therefore under the provisions of the section just quoted the township organization did not cease to exist until last spring when the board was appointed.

With respect to the power of the county treasurer to issue distress warrants, this is my opinion: Section 97 of chapter 77, article 1, entitled revenue, provides inter alia that each township treasurer shall on the first day of September, or within ten days thereafter, annually, make report to the county clerk of all unpaid personal tax, and unpaid real and personal property tax and thereafter such tax, so reported, shall be received and receipted for by the county treasurer only. From this section it is clear that it is the duty of the county treasurer to collect the tax after ten days after the first day of September of each year. Section 89 of the same article and chapter provides inter alia that in counties under township organization the town collector shall as soon as he receives the tax book or books call at least once on the person taxed, at his place of residence, etc., and shall demand payment of the tax, and if any persons neglect so to attend and pay

his personal tax, or shall neglect and refuse after being called upon by the town collector until after the first day of January next after such tax became due, the treasurer shall, by himself or deputy, or the sheriff of the county when directed by distress warrant issued by the treasurer, levy and collect, etc. The right to issue the distress warrant cannot of course exist until after the township treasurer has made his report to the county clerk as provided by section 97 supra. After that report has been made it is then the duty of the tax payer to attend at the treasurer's office and pay his tax, and in the event that he does not do so until after the first day of January next after such tax became due, the treasurer shall have the right to issue his distress warrant, etc. I do not believe that the right of the county treasurer to collect tax, or to issue his distress warrant in the event of the failure of the tax payer can be defeated by the neglect of the township collector to make demand upon the tax payer. The moment the township treasurer makes his report as provided by section 97, to the county clerk, it becomes the duty of the county treasurer to collect the tax and after the first of January following to use all the means pointed out by the statute to compel the payment of the tax properly levied.

Besides section 70 of chapter 18, article 4, provides that the board of county commissioners shall have full and complete power to settle all the unfinished business as fully as might have been done by the town itself. A part of the business of the town was the making of the demand, through its treasurer, upon the tax payer, the town having failed to perform that part of its business. I have no doubt if it were necessary, the board could authorize the county treasurer to make the demand; but my opinion is that such demand on the part of the county treasurer is not necessary and that he has the right to

issue a distress warrant, under the provisions of sections 97 and 87 of the Revenue Act being chapter 77, article 1.

I have been unable to find any supreme court decisions bearing upon the question propounded and hence cannot cite them.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Dec. 29, 1897.

Mr. J. H. Lincoln, County Attorney, Stockville, Neb.

Dear Sir: Your letter of December 20th, making inquiry as to whether any penalty is provided for shipping quail to points within this state under section 7, chapter 98, session laws of 1897, was duly received at this office.

After a careful examination of the section referred to we are forced to the conclusion that the section, as it passed the legislature provides no penalty for the offense indicated. The bill as originally introduced provided the penalty, but by an amendment which was introrduced and made part of the bill the effect of the original sentence was destroyed. This was probably an over sight, and was not the intention of the legislature, but, be that as it may, the section as it now stands cannot be construed as providing any penalty for shipping game within this state.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 7, 1898.

Mr. W. D. Mathews, County Attorney, Hyannis, Neb.

Dear Sir: Your letter of January 6th has been duly received at this office. Replying to your first question I would say that the provision of section 20 of chapter 28

of the Statute appears to settle that question very clearly.

The treasurer is to be paid his fees by retaining a per centage out of each fund collected by him; therefore the treasurer should retain his commission of one per cent on the school moneys out of each collection made by him.

In reply to your second question, you are advised that the law has placed the matter of raising revenue very largely in the hands of the county boards of the different counties, and as to what tax the necessities of the county require, is a matter largely in the discretion of the county board, of course within the limitations prescribed by the constitution of the state, and the revenue laws. The county board of your county would be entitled to levy a tax for roads and bridges if in their judgment the needs of the county required it. As heretofore stated, this matter is almost entirely within the discretion of the board, and unless there is some reason existing which has not been disclosed by your letter, the board would probably have the right to levy a tax for the purpose named.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 10, 1898.

Mr. J. A. Douglas, County Attorney, Bassett, Neb.

Dear Sir: Answering your favor of January 8th, addressed to this office, you are respectfully advised that under sections 18-23 of chapter 18, article 3, Compiled Statutes of 1897, we are of the opinion that the bond therein provided for is a continuing bond, if the same be drawn in accordance with the provisions of that chapter. As a matter of precaution a new bond should be exacted every few years, but we do not think the bond called for by this chapter is for any stated time, or for any particular

county treasurer, but would cover county funds for an indefinite time.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 10, 1898.

Mr. Charles Van Camp, Niobrara, Neb.

Dear Sir: Answering your favor of January 4th, you are respectfully advised that in the opinion of this department each township is entitled to but one justice of the peace, except in those townships in which is located a city of the second class.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 10, 1898.

Mr. James Pearson, Germantown, Neb.

Dear Sir: Answering your favor of January 7th, addressed to the Attorney General, you are respectfully advised that in counties under township organization, each township is entitled to one justice of the peace, except those townships in which are located cities of the second class. In your township there can only be one legally qualified justice of the peace.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 10, 1898.

Mr. W. M. Cain, County Attorney, David City, Neb.

Dear Sir: Answering your favor of January 8th, you are respectfully advised that in our opinion the county clerk is required to enter upon his book and include the same in his report of fees received, the amount allowed him by the board of supervisors for acting as clerk of said board. Our Supreme Court has gone very far in this matter and we think have settled the rule, that any and all moneys received by the county clerk for services performed by him by virtue of his office of county clerk must be entered upon his book and reported by him; he can act as clerk of the county board only by virtue of his office as county clerk. He receives this compensation from the county because he is the county clerk of the county. If he were not county clerk he could not act as clerk of the board. It is our opinion that in reporting the aggregate amount of fees received by him, he must include that paid him for acting as clerk of the county board.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 11, 1898.

Mr. B. F. Eberhart, County Attorney, Benkleman, Neb.

Dear Sir: Answering your favor of recent date, you are respectfully advised as follows:

First—If the county board has not passed upon the sufficiency of the official bond tendered to it before that time, it might properly pass upon the same at its first meeting in January of this year. If the old board adjourned to meet on the 4th of January without having

passed upon these bonds before that time, it would be a matter for it to properly consider at that meeting.

Second—Under the law of this state, county officers are required to give a bond with two or more resident free hold sureties. There is nothing in the law which prevents parties who are not free holders from also signing the bond and certainly the signature of parties who are not free holders would not invalidate the bond. The county board might refuse to approve a bond which did not have the signatures of two free holders, but would not be justified in rejecting it merely because there were others signing the bond who are not free holders.

Third—We are unable to find any provision in the statute which prevents a person from holding the office of justice of the peace and that of coroner. The justice of the peace is a township officer, and a corner is a county officer.

Fourth—Under section 2297 of the Statutes for 1897, a depository bond may be good that has no sureties except officers of the bank. This is a matter of discretion on the part of the county board. The statute does not disqualify them from acting as sureties. The question goes to the advisability of accepting such a bond, rather than to its legality.

Fifth—When the statute refers to "State or national banks or any one of them doing business in the county," I think it means a bank whose principal place of business is in the county. In other words, the banking house must be in the county. It was not the intention of the law to permit the county board of your county to designate a bank located in some other county, as a county depository, even though such bank may be loaning some money in your county. This latter fact would not enable the bank to say it was doing business in your county.

Trusting these answers may meet your questions, we are,

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 14, 1898.

Mr. George W. Ellsworth, County Clerk, Fullerton, Neb.

Dear Sir: The opinion of this office has been requested respecting the right of the county treasurer of your county, or of a county board of your county to deposit, or designate as a depository, for the county treasurer, some bank in Douglas county; you are respectfully advised that in the opinion of this office there is no law under which a bank outside of your own county can properly become a depository bank. We think the county treasurer would have no more right to deposit the county money in a bank in Omaha, than in some bank outside of the state. And by depositing the same in a bank outside of your county, even though done with the knowledge and approval of the county board would not relieve the treasurer's bondsmen of liability, and the treasurer might also be liable in a criminal action.

Respecting the liability of the surety company, where the same has not filed its charter, or a certified copy thereof, with the auditor of state, we would say that its failure to do any of these matters would not be a defense to an action brought on the bond, and would in no way tend to relieve the surety company from liability.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Jan. 18, 1898.

Mr. Ambrose C. Epperson, County Attorney, Clay Center, Neb.

Dear Sir: We very much doubt the power of the county board to accept $400, in full settlement of the judgment for $1700, in the case to which you refer. Where there is no litigation pending and the judgment debtors are perfectly solvent, we very much doubt the right of the county board to make settlement for less than the face of the judgment. Of course they would have power to compromise a disputed claim, and power to settle a matter being litigated in the courts. The rule is well settled that an attorney, after the claim has been reduced to judgment has no power to accept less than the face of the judgment unless specially authorized so to do by his client. The county board acts for the county, and we do not think they have any more authority in the premises than an attorney would have.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln Neb., Jan. 24, 1898.

Mr. J. M. Day, County Attorney, Aurora, Neb.

Dear Sir: We have examined the questions contained in your favor of January 19th, and are of the opinion that section 20 of chapter 18, is a limitation upon the right of the bank to receive money under the depository law. We believe it is also a limitation upon the right of the treasurer to deposit the money under the depository law. In our opinion this is a limitation upon his right as much as the provision which prevents his depositing

more than fifty per cent of the amount of the depository bond. Both of these provisions were intended to make the deposits safe and to prevent any bank from receiving more than a certain per cent of its capital stock. We do not believe the county treasurer has any more right to deposit an amount in excess of the 30 per cent of the capital stock, than he would have to deposit more than fifty per cent of the amount of the bond. If he exceeds the thirty per cent of the capital stock, or exceeds fifty per cent of the bond, we think he becomes liable on his official bond for such excess. We think there would be serious doubts as to whether or not the sureties on the bond of the bank could not be held liable for this excess.

If this is not the correct interpretation of these two sections of the statute then they can have no force and effect whatever. If the treasurer can disregard section 18, then he could also disregard the section limiting the deposit to one half of the bond furnished by the bank. We do not believe he can safely ignore either section.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 25, 1898.

Hon. S. J. Kent, Deputy Commissioner of Labor, Capitol Building.

My Dear Sir: I have your favor of the 19th inst., asking whether or not assessors and county clerks are required to perform the duties imposed upon them with respect to labor statistics, notwithstanding that no extra compensation is allowed therefor. My reply is that they are. The duty of an official is not determined by the fact that his salary is allowed for the thing which he is re-

quired to do, but is determined by the provisions of the law imposing these duties.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 27, 1898.

Mr. J. M. Day, County Attorney, Aurora, Neb.

Dear Sir: Yours of January 25th was duly received. In answer thereto permit me to say that the county treasurer is responsible on his bond for all the money that comes into his hands, unless where that money is placed in the county depository in accordance with the provision of the law. If the county depositories become full, or if there is no county depository, still he must keep the money safely; and he is the judge of the manner in which it is to be kept. He may carry it on his person or he may put it in any bank in or out of the county, in a word, he can put it where in his judgment the money is safe. He and his bondsmen being responsible for its production at the proper time.

It is not true that he is liable because he does not deposit it in a county depository, if there be no county depositories capable of receiving it. The law is reasonable and must have a reasonable construction.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 28, 1898.

His Excellency, Silas A. Holcomb, Governor or Nebraska.

Sir: Permit me to acknowledge the receipt of your letter of the 26th inst., in which you request the opinion of this office, with respect to what items may be charged against the fees collected by the State Oil Inspector and

his deputies, under the provision of the law governing the inspection of oils.

I have the honor to submit the following as my answer thereto:

1. The salary of the State Inspector which is fixed at $2,000.

2. The salaries of not to exceed five deputies, which is fixed at $100 per month for each deputy.

3. The money actually and necessarily expended by the State Inspector for travelling expenses, incurred in the discharge of his duties, and for the proper prosecution of "any case of offense arising under the provisions" of the Act governing the inspection of oils. The expenses here referred to include railroad fare, the fare paid for other conveyance, and hotel bills, but not all railroad or other fares or hotel bills may be included, only those which are necessary in the discharge of the Inspector's duties, or the prosecution of offenses arising under the law governing the inspection of oils. Such fares and bills must actually be paid by him to entitle the inspector to credit for them against the fees in his hands. No other items, in my opinion, may be charged by him against the fees received.

4. The money actually and necessarily expended by each deputy for railroad, stage or other fares; and the money actually and necessarily expended by him, when authorized by the State Inspector, for the purpose of prosecuting offenses arising under said act. Such fares must, as in the case of the State Inspector, be actually paid, and must have been paid for travelling, necessary in the performance of his duties.

Whether the provision of the Statute governing the expenses of deputy inspectors is broad enough to include hotel expenses actually and necessarily incurred while

the deputies are performing their duties presents a question which is not entirely free from doubt. I am, however, disposed to think that a liberal construction of the provision would permit the deputies to include in their expenses, hotel bills incurred as aforesaid.

In my opinion the expenditure by the State Inspector, or any of his deputies, of any of the money received as fees for the inspection of oils, for any other purpose or purposes than those just enumerated would be without warrant of law.

For these reasons, it is at once apparent that many of the items of expenditures for which the State Inspector has taken credit in his report to Your Excellency, must be stricken out as unauthorized by law.

Very respectfully yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 28, 1898.

H. E. Gapen, Esq., County Attorney, Sidney, Neb.

Dear Sir: I have your favor of January 26th in which you stated that the board of county commissioners fixed your salary last year at $650 per annum, but that at the meeting in January of this year, they reduced your salary to $500, and asking whether or not, section 16, article 3, of the constitution does not apply in your case? My answer is that the board has no power over your salary. The amount of salary to which you are entitled is determined by the population of the county. If your county has from 5,000 to 10,000 inhabitants you are entitled to $650 per year; if your county has over 2,500 and under 5,000 inhabitants you are entitled to $500 per year unless unorganized territory is attached to your county for judicial purposes, in which case you would be

entitled to a sum not exceeding $200 to be fixed by the county board. It is the duty of the board to pay you the salary, which according to the population of the county you are entitled to.

The section of the constitution referred to by you does not apply. That applies only in the case of constitutional officers. See Douglas County vs. Timme, 32 Neb., 272.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Jan. 28, 1898.

Mr. L. M. Moulton, County Attorney, Taylor, Neb.

Dear Sir: I have your favor of the 26th inst., propounding certain questions with reference to the law respecting the off setting of delinquent personal taxes against claims held against the county, and submit the following as my answer:

Section 48, chapter 18, article 1, Compiled Statutes of 1897, provides among other things, that when a person holds a claim against a county the county board, in their discretion, may offset the amount of delinquent personal taxes due from such person against said claim.

Section 29, provides that when taxes have been thus set off, the board shall issue an order to the county treasurer, directing him to draw from the same fund out of which the claim should have been paid, the amount of delinquent taxes so set off, and directing him to apply the amount so drawn upon the personal tax of the claimant, and, upon application, gives the claimant receipt for his taxes.

Section 88 of chapter 77, article 1, declaring that county warrants are receivable for the taxes due the county for general purposes.

Section 149 of chapter 77, article 1, requires the treasurer to keep a book called a "warrant book" in which he shall enter every warrant and order received in payment of taxes

Section 12, chapter 93, requires the treasurer under pain of a heavy fine, to pay all warrants not paid in the order of their registration.

From these sections I think it is the intention of the law, to require orders issued as aforesaid by the county board to be treated the same as warrants, received in payment of taxes.

When such an order is received from the county board the taxes mentioned therein should be marked paid and a receipt therefor issued to the person against whom the taxes were assessed. The order should be registered and paid when reached in its order. By following this course you can give force to all sections of the statutes bearing upon the matter and at the same time in my judgment, avoid any difficulty.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Feb. 1, 1898.

Hon. John V. Pearson, County Attorney, Ponca, Neb.

My Dear Sir: I have your favor of January 27th, in which you ask this question: "When is the township treasurer elected, and what must he do to qualify as treasurer and as collector of taxes?"

My answer is as follows: He must be elected at the general election held on the Tuesday succeeding the first Monday of November of each year as provided by section 7, chapter 26, C. S. 1897. This section was passed in 1897 and is therefore, the last expression of the legislature

upon the question and provides specifically for the election of the township treasurer. As township treasurer he must give a bond in the sum of $5,000, or double the amount of money that may come into his hands, to be fixed by the town board. (Sec. 44, chap. 18, art. 4.) This is his official bond and the one which enables him to perform the duties and the one necessary to his qualification as treasurer of the township. This bond must be approved by the county board and must be filed with the county clerk on or before the first Thursday after the first Tuesday in January. (Sec. 7, chap. 10.) To remove any doubt, the bond should be approved by the town board. I find no provision requiring the bond to be filed with the town clerk. It is also necessary to his qualification that he take the oath prescribed in section 1, chapter 10, and that the oath be endorsed upon the bond aforesaid. If he desires to qualify as collector of taxes he must give the bond required by section 92, article 1, chapter 77, and take the oath prescribed in that section, but I do not understand that his qualification as collector is essential to his holding the office of town treasurer. A careful examination of the law as it now exists fails to reveal any provision thereof requiring a bond to be filed with the town clerk. In passing, I may remark that the law of 1893 governing township organization which you cite in your letter was materially changed in 1895.

Very respectfully,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Feb. 1, 1898.

Hon. C. P. Logan, County Attorney, Perkins County, Grant, Neb.

My Dear Sir: I have your letter of January 28th with respect to the questions propounded by Mr. J. M. Kimball,

chairman of the board of county commissioners of your county. I submit below my answers to those questions. The first question is:

"This (Perkins) county is a county having less than 3,000 inhabitants. Does the law require the county clerk in counties having less than 3,000 inhabitants to report the fees earned and collected by him as clerk of the district, and are such fees to be included as a part of his salary of $1,500?"

My answer is, yes, under the authority of State ex rel., Wittemore, 12 Neb., 252. The second question is:

"Is the county clerk required to report fees earned and collected by him for making out the tax list?"

My answer is, yes. And the third question is:

"Is the county clerk entitled to compensation for making out the tax list in addition to the salary of $1,500 allowed him by law?"

My answer is, no. Authority for the answer to both of the above questions is clearly expressed in Bayha vs. Webster County, 18 Neb., 131, and Heald vs. Polk County, 46 Neb., 28. The fourth question is:

"Is the clerk required to report fees earned and collected by him for taking final proofs of lands entered under U. S. land laws?"

My answer is, yes, on the authority of State vs. Kelly, 13 Neb., 574.

I do not think that the decision in the 46th Nebraska, supra, affects the opinion in the 30th Nebraska, supra. In the former case the decision was that the county board having allowed the fees in question to the clerk, and the time for appeal from its decision having elapsed, the fees could not have been recovered by the county from the

clerk. This is, however, far from saying that the clerk was entitled originally to the fees, on the contrary the opinion states clearly, that he was not, and in fact that the board should not have allowed them.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb. Feb. 3, 1898.

Hon. F. M. Walcott, County Attorney, Valentine, Neb.

Dear Sir: I have yours of February 1st, in which you state that your county has a school population of less than 2,000; that there is a question concerning the compensation which your county superintendent is entitled to, and asking for the opinion of this office with respect to the matter.

My answer is, that the following subdivision of section 4731 decides the question which you ask.

"And in counties having a school population less than 2,000, a per diem of not less than $3.50 or more than $5.00 for each day actually employed in the duties of his office."

In that sentence is announced the rule which must govern in your case, and that rule is not affected in any way by what may be the rule in counties having a different population.

In your county the superintendent shall not receive less than $3.50 and not more than $5.00 for each day necessary for the performance of his duties, and he is by the same section made sole judge of the number of days so necessary, with this limitation, that such number shall not be less than the number of school districts in the county, and one day for each precinct thereof This is

substantially the opinion of Judge Kinkaid as set forth in your letter.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 2, 1898.

W. M. Cain, County Attorney, David City, Neb.

Dear Sir: Your favor of February 22d, was duly received at this office, but because of our engagements elsewhere, the answer has been necessarily delayed. The decision of the Supreme Court in the case of Reynolds vs. State, recently decided, held that the act of 1875, by which it was sought to amend the criminal code of our state, was illegal and unconstitutional. Prior to 1875 section 17 of the criminal code of 1873 made the penalty for an unlawful assault, $50, or imprisonment in the county jail not exceeding six months or both in the discretion of the court. In 1875 the legislature sought to amend this, and made the penalty for an unlawful asault, a fine not to exceed $100 or imprisonment in the county jail not exceeding three months or both in the discretion of the court. Later on in 1893 the legislature again sought to amend this section as amended in 1875. This act of 1893 said: "That section 5593 of chapter 4 of the Criminal Code of Nebraska, as the same appears in Cobbey's Consolidated Statutes of 1891 be amended to read as follows:" The legislature then proceeded to amend the statute as to make the punishment a sum not to exceed $100 or imprisonment in the county jail not to exceed three months, and took away from the court the power to impose both penalties. Since the act of 1875 was unconstitutional, I think it necessarily follows that the act of 1893 in which it was sought to amend the act of

1875, is a nullity. The act of 1875 being unconstitutional, there was nothing to amend. And it will be noticed that the act of 1893 especially mentions the section of the criminal code as it then appeared in Cobbey's Statute.

The conclusion to which we come, is that the act of 1873, is the one now in force.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., March 8, 1898.

Hon. Otto Mutz, Chairman Investigating Committee,
Lincoln, Neb.

Dear Sir: Answering your communication of this date, you are respectfully advised that in the opinion of this office no employe of the auditor's office, or department of the state is entitled to extra compensation for services rendered out of office hours. In the case to which you call attention, if the work was done by a person holding a position for which the legislature has provided a certain sum as a salary that person cannot receive extra compensation for any service performed for the state no matter whether performed during office hours or not. Of course this does not prevent an employe of the state from performing services for others and receiving compensation therefor, but he cannot expect the state to pay him for such services.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., March 8, 1898.

John Tongue, Stromsburg, Neb.

Dear Sir: Answering your favor of recent date you are respectfully advised that in the opinion of this office the statute fixes the compensation of the county clerk at a stated amount per annum and not for the term. If the total amount of fees collected by him during one year of his term are not sufficient to pay the salary fixed by the statutes he cannot supply the deficiency out of the fees collected during any other year.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., March 8, 1898.

William O'Brien, County Attorney, Columbus, Neb.

Dear Sir: Answering your inquiry to this office some time since, you are advised that we are unable to find any provision to our statute under which any person, other than an election officer, can be prosecuted for tampering with the ballots cast at an election. This is evidently an oversight on the part of the legislature, but we believe such is the law.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., March 9, 1898.

Hon. John F. Cornell, Auditor Public Accounts, Capitol Building.

Dear Sir: Your favor of the 9th just received. In

it you ask for the opinion of this office as to whether or not you may draw in your own name the $500 appropriated for prosecuting unauthorized insurance companies, use the same for the purpose for which it was appropriated and afterwards file receipted bills showing how the money was expended. My answer is, that I can find no authority which would permit you to do so. If the money was appropriated to you and placed under your control and directed to be used as you might think proper for the purpose named in the act of appropriation you might, I think, draw the money in the maner indicated in your letter. But the appropriation was not made in that way, hence, I can see no way in which you could avoid the filing of the vouchers in the first instance That you can spend the money for the purposes named in the appropriation and afterwards reimburse yourself (upon filing the proper vouchers) out of the appropriation is, I think, beyond question.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 9, 1898.

Hon. A. G. Graves, County Attorney, Plattsmouth, Neb.

Dear Sir: I have your favor of the 7th, in which you ask for the opinion of this office with respect to the right of the defendant in a criminal case to take depositions under the sections involving depositions in civil cases. Owing to want of time I have not been able to give the subject a satisfactory examination but from such examination as I have been able to make I am of the opinion that section 462 of the criminal code is exclusive in criminal cases. In section 372 of the civil code are enumerated the cases in which depositions may be taken.

The next section provides that either party may commence taking depositions at any time after service upon the defendant.

It is clear that this last section refers to civil cases only, for of course the state cannot take depositions in criminal cases.

Chapter 44 of the Civil Code under which we find section 462 seems to cover the entire subject of depositions in criminal cases and I think the rule that where a certain way is pointed out by statute that way excludes all others, applies to section 462. If this be true, then of course a deposition taken under any other section of the statute could not be used in a criminal case.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 14, 1898.

Hon. J. B. Meserve, State Treasurer, Lincoln, Neb.

Dear Sir: Answering your communication of this date you are respectfully advised that in the opinion of this office it is the duty of the county treasurer under section 165 of chapter 77 of the Compiled Statutes of this state to pay the necessary expenses for transferring the money due the state to your office. The statute in question provides that the several county treasurers shall pay to the state treasurer all funds in their hands at stated periods. If any treasurer elects to use the express company as a medium for conveying this money to your office, then such express company is an agent of the county treasurer and must be paid by him. The county treasurer

has no right to deduct the charge of the express company or to require that you pay the same.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., March 22, 1898.

Hon. John F. Cornell, Auditor Public Accounts, Capitol Building.

Dear Sir: Some time ago this department gave an opinion relative to the fees which sheriffs were entitled to charge the state for boarding state prisoners. And at that time we consulted chapter 28 of the Compiled Statutes entitled "Fees," and concluded that the state could be required to pay 75 cents per day where prisoners were confined less than six days and $3.50 a week where persons were confined for more than six days; but cannot be required to pay 75 cents per day where such prisoners were confined more than six days. Our attention has again been called to some other provisions in our statute and we have been asked to again examine into this question. We have done so, with some care, and find the following:

In 1866, two statutes were passed, one entitled "Fees" and the other "Jails." By the latter act it was provided that the sheriff should receive 75 cents per day for boarding all prisoners in his custody. It then applied to county or city as well as state prisoners. The act entitled "Fees," passed at the same session of the legislature fixed the fees of all county officers, but made no provision for sheriff's fees for boarding prisoners.

In 1869 the legislature amended the statute above referred to, entitled, "Jails" and then provided that the sheriff receive 75 cents per day for boarding state prisoners and made no provision for boarding other prisoners.

In 1875 the legislature amended the statute entitled "Fees" and among other things provided that the sheriff should receive 75 cents per day for boarding prisoners. In 1877, this statute as amended in 1875, was again amended and it was then provided as follows: "For boarding prisoners per day not exceeding 75 cents per day no more than $3.50 per week, where the prisoners are confined more than six days." This is the act as it now appears in the Compiled Statutes. It will thus be seen that at no time since 1869 has the provision in the statute entitled "Jails" been amended or repealed, unless it can be said it was amended or repealed by implication by the passage of the act of 1877, amending the statutes entitled "Fees." If the act of 1869 entitled "Jails" provided that the sheriff should receive 75 cents per day for boarding all prisoners then there would unquestionably be a conflict between that statute and the statute of 1877, hereinbefore referred to, and we think we would be warranted in saying that the act of 1869 would be repealed by implication, but it will be noticed that the act of 1869 entitled "Jails" specially refers to state prisoners, while the act of 1877, entitled "Fees" is a general statute.

Our Supreme court has on several occasions laid down the rule in such cases as follows:

"It is an inflexible rule that where there are special provisions of a statute plainly referring to a particular matter, and there are general provisions of another statute in force at the same time referring to a class or series of matters including the former, the provisions of the special statute will prevail, so far as such particular

matter is concerned, and the provisions of the two differ with each other."

Richardson County vs. Mills, 14 Neb., 311.

"Special provisions of the statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict."

Albertson vs. The State, 9 Neb., 429.

Our Supreme Court has held that they will not favor repeals by implication. Thus in the case of Beatrice Paper Company vs. Beloit Iron Works, 46 Neb., 900, they said "The statute will not be considered as repealing by implication another statute unless the repugnacy between the two is plain and unmistakable."

And in the case of the State vs. Hay, 45 Neb., 724, they said:

"The subsequent statute treating of a subject in general terms, and not expressly contradicting the postive provisions of a prior special act, will not be construed as a repeal by implication of the latter if any other reasonable construction can be adopted."

In the light of those decisions we do not feel warranted in advising you that the act of 1877 entitled "Fees" repealed the act of 1869 so far as the latter applies to fees. The two statutes can be construed together by holding that the act of 1869 entitled "Jails" referred to the sheriff's compensation for keeping state prisoners and the act of 1877 entitled "Fees" applied to all other prisoners.

While we are not without some doubt concerning this matter yet although finding these acts in our statute, we do not feel warranted in holding or advising you that one of them is inoperative. Such a ruling should come from the courts if at all, and not from this department.

The conclusion to which we arrive is, that sheriffs are

entitled to 75 cents per day for each day they keep in their custody state prisoners.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., March 25, 1898.

W. E. Goodhue, Esq., Hebron, Neb.

Dear Sir: I have yours of March 19th, containing the following questions:

"Suppose a part of the election board appointed last fall live in the precinct of Hebron and part in the city of Hebron, can those outside of the city limits act as members of the election board within the limits at the coming city election? It seems not to me, and if that be so, how are we to get the election board for our city election?"

My answer to the first question is, that in my opinion section 17 of chapter 26 of the Compiled Statues of 1897, is not applicable to the class of cities and villages provided for in chapter 14, article 1. Judges and clerks of an election provided for in section 17 supra, are to serve "At all general, special and municipal elections, held in the county, precinct or city of which the voting precinct in which they reside forms a part."

If therefore, the precinct in which the judges and clerks reside is not wholly within the city or vilage, that is, does not form a part of it, such judges and clerks are not competent to serve at an election held in such city or village, for village purposes. Election precincts which are partly within and partly outside of cities or villages exist only in connection with villages and cities of the second class, provided for by article 1, chapter 14. The charters of all other classes of cities provide that pre-

cinct lines in that part of the county embraced within the corporate limits, shall correspond with the ward lines in all cities.

In placing this construction on section 17, chapter 26, I am not free from doubt; but in the time I have been able to give an investigation of the matter it seems to me the only reasonable conclusion of which the section is susceptible.

My answer to your second question is that under section 69, of article 1, chapter 14, cities and villages provided for in said article have the power to appoint the judges and clerks of election. See subdivision 11, section 69.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 29, 1898.

To His Excellency, Silas A. Holcomb, Governor.

Sir: I have your favor of the 28th inst., in which you state that a complaint has been filed in your office against three members of the fire and police commission of Omaha charging them with misconduct in office and praying for a hearing at Omaha of the charges made, and that you desire to know whether or not, in the opinion of this office, you may, under the law, designate a suitable person to act as referee to hear the testimony and report to you his findings of fact and conclusions of law. I have the honor to answer that in my judgment, you may do so. Section 168 of chapter 12a, provides that you shall investigate the charges upon the testimony thereon. There is nothing therein which provides how the testimony shall be taken, "Whether orally or by means of affidavits or depositions." That is left to you to determine. On the theory that a court may refer a matter before it

for adjudication, or call in assistance in any other proper way, where the pressure of its duties demands, I think you can send these charges to a competent person as referee. He as such referee would not have the right to administer oaths, but that condition would not present a difficulty which could not easily be overcome. When his report would be submitted you would have only competent and relevant testimony before you for consideration, and that would be carefully digested and the law bearing thereon stated, thus much time and labor would be saved to you, and yet an impartial hearing would be had and justice done to all parties to the proceedings.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 25, 1898.

Hon. John F. Cornell, Auditor of Public Accounts, Capitol Building.

Dear Sir: In answer to your question as to whether or not insurance companies doing business in this state without lawful permission may be reached and punished for their infractions of the law where they have no representative in this state, permit me to say that in my opinion they cannot. Such companies can be punished only through an officer or person doing business or attempting to do business in the state without proper permission. But is it a fact that these companies have done and are doing business in this state without a representative therein? I am informed and believe that it is not, yet I have no legal proof of the fact.

That the risks which those companies have taken upon property in the state were not taken before a careful examination of the property was made by some person in the state, does not in my judgment admit of doubt. The

person who made those examinations, I am confident, resides in Omaha, and is well known to the local insurance agents doing business in Omaha. Those local agents I understand have complained to you of the actions of the companies aforesaid. They have in their possession, as I believe, the evidence which will enable you to enforce the provisions of section 26 of the insurance laws, which is a section providing for the punishment of those who violate insurance laws.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., March 25, 1898.

To the Honorable, The Board of Educational Lands and Funds.

Gentlemen: The Douglas county funding bonds which have been offered to your board of sale, are signed by Mr. Steinberg, chairman of the board of county commissioners, and Mr. Redfield, clerk of said county. Since signing the said bonds Mr. Steinberg and Mr Redfield have gone out of office. The present chairman of said county board is Mr. Keirstead, and the present clerk is Mr. Haverly. The county board is ready to authorize the delivery of the bonds signed by Messrs. Steinberg and Redfield, as chairman and clerk respectively. The present chairman and clerk fully acquiesce in what was done by their predecessors in office, and are ready and willing to deliver the bonds. Out of this state of facts the question arises, "Would the bonds if delivered under these circumstances be valid obligations of the county? My opinion is that they would be. I base it upon general principles of law, which need not be stated here, but more especially upon the decision of the Supreme court of the United States in the case of "The Town of Wayauwega

vs. Ayling, 99 U. S., 112." In that case the bonds bore the date of June 1st, 1871. At that time one Fenlon was chairman, and one Verke clerk. The signatures of these officers were lithographed and printed upon the coupons. Before the bonds were actually signed by Verke, he had resigned his office and moved out of town and another officer had been appointed and qualified in his place. Verke, after going out of office, affixed his signature to the bonds. The bonds so signed by Verke and Fenlon were taken by Fenlon and delivered. It was assumed from these facts, that the person who was clerk at the time of the delivery and at the time of the signing of the bonds assented to their delivery, although as I have stated he did not sign them. The Supreme Court said:

"If a bank puts out a note for circulation bearing the signature of one who was in fact president of the bank when the note bore date, no one will pretend that it could be shown as a defense to the note when sued upon by a bona fide holder that the signature of the person purporting to be the president was affixed after he had gone out of office." Again, "It must be assumed for all the purposes of this case, that the bonds were delivered to the railroad company by the chairman with the consent of the clerk, and, therefore, that they were issued as negotiable instruments by the proper officers of the town."

The decision in that case was adhered to in two subsequent cases. I take it therefore, that the principle announced by it is not only good law but settled law. The only difference between the facts in that case, and the facts in the one in question is that the clerk in that case when he signed the bonds was out of office, while both the clerk and the chairman in this case were in office when they signed. This makes the case which we are investigating a stronger case for the application of the principle announced in the case which the Supreme Court had before it.

I would suggest therefore, that the board of county commissioners pass a resolution authorizing and directing the delivery of bonds to your board. That the present chairman and clerk deliver the bonds and report their action to their county board, and that a record of the delivery of said chairman and clerk be made by the board, also that the state treasurer make a note of the fact that the bonds were delivered by the present chairman and clerk.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., April 8, 1898.

J. G. Thompson, Alma, Neb.

Dear Sir: Answering your favor of recent date you are respectfully advised that the Attorney General has given others the opinion that the bonds of township officers must be filed by the county clerk and approved by the county board. The fact that the oath of office was filed with the bond instead of with the town clerk, would not, we believe cause a vacancy in that office. In the case of a vacancy in a town office the vacancy is filled under our statute by the town board. If you will look at the case of the State ex rel Goddard against Taylor, you will find this matter discussed.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., April 13, 1898.

D. B. Conway, Milford, Neb.

Dear Sir: Your favor of April 10th was duly received. You make inquiry as to the method to be pursued

by you and other assessors of your county in order to exempt from taxation and keep off the tax rolls, corn held by farmers and which it was agreed should be assessed. Chapter 77 of our Statute provides for assessing for taxation all property within this state except as mentioned in section 2 of that chapter. The chapter further provides that all personal property shall be valued at its fair cash value. Under the strict letter of the law, all personal property owned by any person on the 1st day of April should be assessed. I am unable to point you to any provision of our statute, which authorzes either the town board or the county board, when sitting as a board of equalization to strike any property from the list unless it be shown that the person thus assessed did not in fact own the property on the first day of April.

Very truly yours,
ED P. SMITH,
Deputy Attorney General.

Lincoln, Neb., April 11, 1898.

R. G. Strong, County Attorney, Pender, Neb.

Dear Sir: We acknowledge receipt of your favor of April 1st, and note the inquiries you make therein. We have given these matters some consideration and respectfully advise you as follows:

1. Any fees received by the county clerk for recording or indexing certified copies of the records of the county would be properly charged against his official account as county clerk.

2. If any action has ever accrued against the bondsmen of the county clerk it would not outlaw until ten years thereafter.

3. We very much doubt whether the present board has the right to make an order covering the clerkhire

during the past term of the clerk. The statute clearly provides that this order shall be made by the board in advance. If the claim, however, was filed at this time for extra work or any other purpose and the same was allowed by the board, it would be binding unless an appeal should be taken therefrom.

4. Your next inquiry is not sufficiently clear to enable us to understand it. You speak of certain claims being allowed but not "warranted," "because of the debts existing against the county and you say "they are past until in their turn there is a sufficient levy against which to draw a warrant." If by this we are to understand that the board allowed claims in excess of the amount of tax levied, then we are of the opinion that such action on the part of the board allowing the claims was ultra vires and void and their action in that respect creates no liability on the part of the county. If, however, the claim was properly allowed but no warrant drawn because of lack of funds in the treasury, then we do not believe the county board at a subsequent session had the right to reconsider its action in allowing the claim and then cut it down or disallow it altogether. The action of the board in allowing the claim is a judicial act and we do not think the board could at a subsequent session on its own motion in the matter, object and disallow the claim. Your inquiry is not clear on this point. If they were to allow it after the entire levy had been exhausted, then we think such an act would be void. Further on, your letter would seem to indicate that in the amounts which the accountant has charged against the county clerk for these several years he has included certain claims which are filed by the deputies in actual service and allowed by the county board in that manner. If this be true then we think the clerk has been improperly charged with the same. In other words if the deputies, either in their indi

vidual names or as deputies have filed claims with the county board, which have been allowed to them and payment made to them these amounts should not be charged upon the account of the county clerk when making up the total received by the county clerk. We do not think that there is any merit in the contention that the clerk is not accountable for fees received for district court work. That question seems to be settled by the case of The People vs. McCallum, 1 Neb., 182. If you will advise us more fully concerning some of these matters we will assist you further if we can. If you will examine the case of the State ex rel Hamilton Co. vs. Whittemore, 12 Neb., 252, you will find that it is conclusive of the question as to whether the county clerk must account for fees received as clerk of the district court. The case of Rogass vs. Cuming County, 36 Neb., 375, may also assist you in a solution of your difficulty.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., March 31, 1898.

A. E. Garten, Albion, Neb.

Dear Sir: Yours of March 26th was duly received. In it you ask whether or not assessors can be compelled to do the work required to be done with reference to the labor statistics. This question was answered some time ago by me, and the opinion published in many if not all the state papers. In effect the opinion was that the duty of the assessors is not affected in any way by the fact that they are or are not to receive compensation for the performance thereof. The law fixes the duty and under their oath, the officers must perform all their duties, even

though they do not get a cent for it. To collect statistics is as much their duty as to assess property.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., April 1, 1898.

Mr. W. S. Raker, Gretna, Neb.

Dear Sir: Answering your favor of March 31, you are respectfully advised that section 43, chapter 14, defines the qualification of trustees of villages of more than 200 and less than 1500 inhabitants. I take it that your village comes within this class. By this section any person who shall have attained the age of twenty-one years is a citizen of the United States, who is an inhabitant and tax payer of the village at the time of his election and has resided there for three months preceding his election is eligible to the office of trustee. The fact that he may at this time be engaged in business as a saloon keeper is not mentioned in the statute as a disqualification.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., April 1, 1898.

Mr. C. N. Gaylor, Galloway, Neb.

Dear Sir: Answering your favor of March 31, you are respectfully advised that the Attorney General has given the opinion to other parties, that where the village limits are co-extensive with the limits of the precinct for which judges and clerks of election were appointed by the county judge, the judges and clerks of election so

appointed by said county judge should act at the village election.

If these judges and clerks are present, ready and willing to serve in that capacity, then no others would have the right to act in that capacity. If, however, the precinct limits for which judges and clerks of election were appointed by the county judges are not the same as the limits of the village within which the municipal election is to be held then the judges and clerks of election appointed by the county judge are not competent to serve at the election held within such village for village purposes. In the latter event a new set of judges and clerks of election must be provided for.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., April 7, 1898.

W. R. Butler, County Attorney, O'Neill, Neb.

Dear Sir: We are in receipt of your several favors, in which you submit different inquiries to this office. We have given the matter consideration and respectfully advise you as follows:

1. When your county has recovered judgment against parties and the judgment has been affirmed by the Supreme Court, then if the judgment debtors are able to pay or if the judgment can be made on execution, then we do not think the county board have the right to accept a less sum than the judgment, interest and costs and compromise the claim. The county board acts in a representative capacity and if they can easily collect the full face of the judgment, they have no right to accept less. If the claim however is a doubtful one and it would take

further litigation in order to collect and there may reasonably be expected to be some doubt as to their ability to collect it all, they no doubt have a right to compromise.

2. Where the county board several years ago allowed a claim against the county and a warrant is drawn therefor, but the party entitled to the warrant fails to call for it, we do not believe the board at this late date, have the power to cancel and destroy the warrant. They certainly have no power to set aside an order of the old board, that allowed the claim. We do not believe that they have any authority to order the warrant cancelled or destroyed.

3. The statute plainly contemplates that a different bond shall be required of the person to act as township treasurer, than to act as township collector of taxes. We are not entirely clear on the matter but we see no reason why one could not qualify as township treasurer and not act as township collector of taxes. Section 93 of the revenue law provides, that if such collector fails to execute his bond and take the oath required, then his office as such collector shall be deemed vacant. You will notice that it does not provide that his office as township treasurer shall be deemed vacant but merely that his office as such collector shall be deemed vacant.

4. Our statute seems to be contradictory in its provisions as to what is the proper board or authority, to approve the bonds of the township officers. Chapter 10 of our statute entitled "Official bonds," provides that the "official bonds of all county, precinct and township officers shall be approved by the county board." That part of our statute providing for township organization, section 18, chap. 18, seems to provide that the bond of the township treasurer shall be approved by the township board. This is in direct conflict with sec. 7, chap. 10, hereinbefore referred to. When the legislature passed the

township organization law, they made no attempt to amend sec. 7 of chap. 10 and this office prior to this time has given the opinion that the bond must be approved by the county board and filed with the county clerk. His oath shall be endorsed upon said bond.

5. If the party fails to qualify or refuses to qualify as township treasurer under section 93 of the revenue law, the statute plainly provides that the county clerk may appoint a collector and we cannot see wherein there would be a conflict of authority between the two treasurers. The tax collector would have no duties to perform except the collection of taxes and he should make his settlement with the county treasurer for the amount of money due to that officer.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., June 11 1898.

John M. Day, Esq., County Attorney, Aurora, Neb.

Dear Sir: Your letter making inquiry with respect to the payment of bounties by the state for killing wild animals has been duly received at this office. If the legislature has made no appropriation for this purpose the Auditor would certainly have no authority to draw a warrant.

As provided by section 1, article 8, chapter 83:

"No warrant shall be drawn for any claim until an appropriation shall have been made therefor."

The legislature must appropriate the funds either for the specific claim or for the purpose. Where no such

appropriation has been made the Auditor has nothing against which he can draw a warrant.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., June 15. 1898.

J. C. Naylor, Esq., Callaway, Neb.

My Dear Sir: Your favor of June 4th was duly received at this office but on account of other pressing business the answer has been delayed. The matter to which your letter refers is not one strictly within the duty of this department to advise concerning, but we will give you the benefit of our views. While your letter does not state, yet we infer you are organized under subdivision 6, chapter 79, Complied statutes of 1897. That subdivision provides that the Board shall consist of six trustees and that these trustees shall elect one of their own number moderator. We are not of the opinion that the moderator can vote only in the case of tie. Simply because he has been chosen as moderator ought not to deprive him of the right to vote on all matters which may come before the Board. Such being the case when there were three votes cast for one applicant and three for another no one would be elected. It is a rule governing all bodies, unless otherwise provided by some law either constitutional or statuory, that a majority of a quorum can lawfully transact business. Such being the case five members of the Board had a right to transact business, and a majority of those present would have the right to make a binding contract. Under the facts stated in your letter it would seem to me that the party who received three votes when but five members of the board were present and voting, is the one who has a right to the position. This matter is one which should be called to the attention of the attorney for the

board, if it has one, and if it has not, then some competent attorney in your county should be consulted. In case litigation grows out of it, this office could not be expected to take any side in the matter, and hence before taking definite action you should consult some attorney who could attend to the litigation if any should follow.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., June 16, 1898.

Guy Laverty, Esq., County Attorney, Burwell ,Neb.

My Dear Sir: Answering your favor of June 14th you are respectfully advised that under the depository law, your county board cannot make a contract with a bank outside of the county under which such bank is to receive county money and pay interest thereon. Neither do we think the county board is authorized to take a bond from a bank in your county for the safe keeping of county money without a bank agreeing to pay interest. In other words the county board has no authority to make a contract with any bank for the safe keeping of county money except as that authority is given by the depository law, and that law limits their authority to the taking of a bond from banks within the county and expressly requires that such banks shall agree to pay interest.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., June 16, 1898.

W. E. Goodhue, Esq., County Attorney, Hebron, Neb.

My Dear Sir: In regard to creating and filling the vacancy on your county board we are of the opinion that there is no power to lawfully appoint until a vacancy is created and any appointment prior to that time would confer no legal right. We do not believe that in the case you mention you have a right to declare a vacancy without giving the party an opportunity to appear and show cause against such action. If the member removes from the county so that he is no longer a resident thereof, we think such an act ipso facto creates a vacancy, but in the case you mention he seems to be eligible to the office, but continually absents himself and fails to perform his duties. Under the circumstances we think a complaint ought to be filed asking that he be removed because of such action and notice given to him that the complaint would be heard on a certain date and then if he makes no defense, or whether he does or not you can lawfully declare the vacancy and after that an appointment could be made.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., June 21, 1898.

S. H. Mapes, Schuyler, Neb.

Dear Sir: Your favor of the 20th is received. Section 102, chapter 26 of our statutes defines the causes which shall work a vacation of an office. You will notice that the 9th subdivision is the acceptance of a commission to a military office in the service of the government, which would require absence from the state for 60 days. I do not understand that enlisting as a private, would

work a vacation of your office but to accept a commission in the volunteer service would no doubt have the effect of vacating your office.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., June 29, 1898.

Hon. John Barsby, County Attorney, Geneva, Neb.

My Dear Sir: Answering your favor of the 25th, you are respectfully advised that where a bastardy suit is prosecuted in the name of the injured party the county attorney is not required to prosecute the case as one of his duties as county attorney. If the suit were prosecuted in the name of the county it might be different, but where it is prosecuted in the name of the injured female our Supreme Court has determined that the suit is civil rather than criminal.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., June 29, 1898.

E. A. Tucker, Esq., Humboldt, Neb.

My Dear Sir: Answering your favor of the 25th, you are respectfully advised as follows:

1. In our opinion the party referred to does not violate any law by merely shipping his beer to your city, storing it in the ice house and then shipping it out.

2. If he is licensed to sell at Table Rock and Dawson, and sells at those points he can deliver from your city without violating any law.

3. He cannot under his license to sell at Table Rock

take an order in your city and deliver the same to the purchaser at that place. Such an act constitutes a sale and delivery at Humboldt and the fact that he has a license to sell at Table Rock would constitute no defense. The sale and delivery in such a case is made at Humboldt, and unless he has a license to sell at that place he makes himself liable to a criminal prosecution.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., June 30, 1898.

Hon. J. V. Wolfe, Commissioner of Public Lands and Buildings.

My Dear Sir: Replying to your communication of this date with respect to your right to rebate interest on school land contracts where the purchaser desires to make payment and obtain a deed, (he having paid interest in advance to the first of next January), respectfully advise you that, in the opinion of this department, you have no authority under the present law for making such rebate. The legislature of 1895 inserted a provision authorizing the commissioner of public lands and buildings to deduct from the purchase price the unearned interest which had been paid in advance, if the party afterwards desired to make payment on the contract of sale. In 1897 that part of the statute was repealed. Section 10. chapter 71, of the Act of 1897, provides that the purchaser may at any time pay any portion of the purchase price, provided that the interest has been paid in advance to the first of January following. The right of the county treasurer to accept payment of the principal before it is due by the terms of the contract, or the right of the

state officers to issue a deed is regulated wholly by statute. Since there is now no statute which authorizes the treasurer to make any deduction, or rebate, or accept payment of principal in whole or in part except when the interest has been paid in advance to January first, following.

We therefore conclude that you have no right to deduct from the purchase price interest not yet earned, but which has been paid in advance. And further, if the interest for the year has not been paid in advance, then you will be required to collect the same to January first following before you can receive a partial or complete payment of the purchase price of the land. The law does not permit you to receive at this time the purchase price of the land and interest to this date only, but in case partial payment of the purchase price is made it is your duty under the statute, to first require the payment of the interest on the full purchase price to January first, following.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 7, 1898.

H. J. Welty, Esq., County Attorney, Pender, Neb.

My Dear Sir: Your communication asking the opinion of this department on a number of propositions was duly received and we have given it as careful attention as its great length and the other duties of this office will permit, and you are respectfully advised as follows:

1. Where a non-resident owes personal taxes and has no personal property in the state, but has real estate in your county, no general power to bring suit by attachment in the name of the county to collect the taxes

is given by our statute. Section 89 of the revenue law contains a provision that where no personal property of the delinquent can be found, it shall then be the duty of the treasurer when directed so to do by the county board to commence suit by civil action in the district court to collect the taxes and the action shall be prosecuted as any other civil action. It is further provided in that section that no property shall be exempt from levy and sale under the process issued on the judgment obtained in that action. This would clearly indicate that real property might be attached in this action and sold to satisfy the claim, but no action could be properly commenced until an order has been made by the county board directing the same. If you will refer to the case of Richards vs. The County Comissioners, 40 Neb., 45, you will see where the Supreme Court has discussed this question.

2. The statute imposes the duty on the sheriff to keep and maintain the prisoners in the county jail who have been held for trial in the district court. It further provides the compensation that shall be allowed him for such services. He cannot refuse to perform those services merely because the warrants of the county may be at a discount. He has no right to demand pay for his services in advance, but must perform them and rely on the credit of the county for his pay or resign his office.

3. This inquiry is more difficult to answer and we are not entirely clear that we have come to the right conclusion. From the statement contained in your letter we understand that in 1893 the tax list as certified to the county treasurer included about 80,000 acres of Indian lands upon which taxes were levied by the county board. If this had been lawful about $9,000 of taxes would have been properly due the county. Before these taxes on the Indian lands were declared unlawful claims were filed with the county board, the same being allowed and war-

rants issued to the extent of 85 per cent of this $9,000. The question now is, are the warrants isued in excess of 85 per cent of the amount of taxes lawfully levied legal or illegal. Section 33, chapter 18, article 1, statutes of 1897, provides that upon the allowance of any claim by the county board a warrant shall be drawn for the amount thereof. Section 34 of the same chapter expressly provides that it shall be unlawful for the county board to issue any warrant for any amount exceeding 85 per cent of the amount levied by taxes for the current year. Unless there be money in the treasury with which to pay the same. Section 36 of the same chapter provides that any warrant drawn after 85 per cent of the amount levied is exhausted shall not be chargeable as against the county. Reading these three sections together it must be clear that if a warrant issued in excess of 85 per cent is no claim against the county, then the county board has no right to allow any claim in excess of 85 per cent, for the reason by section 33 it is made the duty of the clerk to issue a warrant as soon as the claim is allowed, but in your case warrants were not issued to exceed 85 per cent of the amount of taxes which had actually been levied. It turns out, however, that a portion of the tax levied was illegal. While we are not entirely clear on this point we are of the opinion that the court would hold the warrants issued on this levy prior to the time that the taxes on the Indian lands were declared illegal, would be valid claims against the county. After these taxes on the Indian lands had been declared illegal so that the county board and all other persons dealing with the county would have knowledge that claims were being allowed and warrants drawn in excess of 85 per cent of the amount of taxes lawfully collected, then no claim would exist against the county because of the allowance of these claims or the issuance of the warrants. Your inquiry

further states that each year since 1893 the board has levied about $3,500 of taxes and allowed claims to the extent of $5,000 or $6,000. In other words the county has allowed claims amounting to $2,000 or $2,500 in excess of the taxes that have been levied during these years. If that be the case it must necessarily follow that these claims which have been allowed in excess of the taxes levied have been allowed without any authority of law and create no obligation against the county by such allowance. The county board had no right to allow the same, and the county clerk would have no right to issue a warrant thereon, and if warrants have been issued, then under section 36 above referred to, they are not chargeable as against the county and should not be paid. The The county board has no right to allow a claim when it cannot draw a warrant in payment thereof, and the fact that the claim is allowed under these circumstances, would not create a binding obligation against the county. In other words claims allowed after the levy has been exhausted are not valid allowances.

4. In regard to the claims of your county clerk you speak of it as being a "shortage." I do not understand, however, that you mean he is short in his accounts with the county in the sense that he owes the county anything. If there is any shortage it would seem from your letter to be the other way. The question seems to be, does the county owe him? Under our statute, the salary of the county clerk must be paid out of the receipts of the office, or they cannot be paid. If the county board allows him a deputy or assistant, as it has a right to do under section 42, chapter 28, the fees of such deputy or assistant must also be paid out of the receipts of the office. If the entire receipts of the county clerk's office in 1894 were only $1,259.51, then the county board would have no right to make an allowance for a deputy and pay him out of the

general fund of the county. The law allows the county clerk a salary of $1500 to be paid out of the fees of the office. Your letter states that he only received from fees $1259.51; that certain claims were allowed by the county, but no warrants ever drawn and of course not paid. It is hard to see wherein any "legal shortage" exists against your county clerk.

5. All fees received by the county clerk for any and all services performed by him as county clerk are properly chargeable to him and must be reported by him and entered upon his fee book. If the county clerk made transcripts of the records of other counties and charged your county therefor, filing his bill for the services rendered by him as county clerk, then the amount thus paid should be charged by him and entered in his report of fees collected. Our Supreme Court has gone to the extent of holding that any and every act performed by a county clerk by virtue of his office must be entered by him in his fee book.

6. I do not understand that one county board has the right to reconsider and disallow a claim that has been allowed by a prior board. If the prior board had the right to consider the claim and allow or disallow it, then such action amounts to an adjudication of the claim and a subsequent board cannot reconsider the matter and reject the claim. See Stenberg vs. State, 48 Neb., 299; State vs. Alexander, 14 Neb., 280.

7. When the county clerk addressed his communication to the county board, dated February 5, 1896, and asked that the board permit him "until further order in the premises" to hire one deputy and charge the same against the income of his office, and the county board granted the request we are of the opinion that would be authority for the county clerk during his entire term of

office. We do not believe it would be authority for his successor or for the same clerk if he were afterwards re-elected. The circumstance that the board might change would not alter the fact.

These matters have required a good deal of attention, and present some questions upon which we are not entirely clear, but we believe that we have arrived at the proper conclusion. Trusting that it may be of some benefit to you and apoligizing for the long delay, we are,

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 8, 1898.

Hon. John F. Cornell, Auditor of Public Accounts.

My Dear Sir: Answering your communication of this date relative to what is a proper charge against an appropriation made by the last legislature for prosecuting unauthorized insurance companies, or their agents, you are respectfully advised that in my opinion the charge mentioned in your letter is a proper charge against the appropriation referred to. The intention of the legislature in making the appropriation referred to was to provide a fund to enable your office to prevent unsafe and unauthorized insurance companies doing business in this state. In the case to which you refer the insurance company was doing an unauthorized business. You ordered them to stop writing insurance and compelled them to cease doing business. You accomplished the same purpose as though the prosecution had been instituted, and

I think any expenses incurred are properly chargeable to the appropriation referred to in your letter.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 11, 1898.

W. J. Long, Esq., County Judge, Hebron, Neb.

My Dear Sir: Answering your favor of July 8th, you are advised that, in our opinion, the summons was not defective because made returnable upon Tuesday the 5th, instead of Monday the 4th of July. Had it been made returnable on the 4th no action could have been taken until the 5th, but we do not believe that the service is defective or the jurisdiction of your court in any manner affected by your action in making it returnable on the 5th.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 14, 1898.

A. L. Bishop, Esq., County Attorney, Bartlett, Neb.

My Dear Sir: Your favor of July 8th was duly received. Our understanding of the internal revenue law is that a County treasurer issuing a check in his official capacity on public funds deposited in banks to the credit of the County is not required to attach a revenue stamp.

The County Board of your County has no right under the depository law to designate a bank in another County as a depository of County funds. If there is another bank in your County that has complied with the

depository law, then the County treasurer is the custodian of the funds and if he deposits the same in any bank for safe keeping he does so on his own responsibility. Any bond given to him by an outside bank might be good as a common law bond but would not be a depository bond provided for by the depository law of this state.

Our statute makes provisions for investing the sinking fund of a county in county warrants. Your attention is called to section 14-19, chapter 93, page 1123, Compiled Statutes 1897.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 14, 1898.

H. Whitmore, Esq., County Attorney, Franklin, Neb.

My Dear Sir: Answering your favor of July 12th, we are of the opinion that the village board has authority to pass a valid ordinance prohibiting the riding of bicycles over and upon sidewalks except at street crossings. While the statute does not expressly confer this authority, we believe the general supervision of streets and side walks which is conferred upon the village board by the statute is broad enough to include an ordinance making this provision.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 15, 1898.

L. S. Sage, Esq., Secretary Board of Education, Wymore, Neb.

My Dear Sir: Permit me to acknowledge the receipt of your letter of the 13th inst., in which you inquire on behalf of the board of education whether or not, "women who pay taxes or have children of school age would be allowed to vote on this question," naming the question whether or not the bonds of the school district shall be issued for the purpose of procuring funds with which to build an addition to one of the school buildings. My answer is, that in my opinion, such women have a right to vote on that question. Section 4, subdivision 2, chapter 79, Compiled Statutes of 1897 provides in substance that females having the property mentioned therein or having children of school age residing in the district shall be entitled to vote at any district meeting. This section determines who are qualified to vote at district meetings. Section 2, subdivision 15, chapter 79 provides that "no bond shall be issued until the question has been submitted to the qualified electors of the district and two-thirds of the qualified electors present voting on the question shall have declared their votes in favor of issuing the same." From this it is clear that the vote provided for shall be taken at a district meeting and that every qualified elector of the district shall have a right to vote thereat. Females having the qualifications mentioned above are qualified electors of the district for the purpose of voting at district meetings, and hence it seems to me have a right to vote at such meetings. The case of Fullerton vs. School District, 41 Neb., 593, was tried before Judges Tibbets, Strode and Hall of Lancaster county, district court, sitting in banc. The question submitted in your letter appears to have been in that case. The 10th finding of the court (it is found on page 597) has this

for its last phrase, "that there were at least 2,000 female voters in said district who had a right to vote upon this bond question." While the Supreme Court reversed the decision of the lower court it did not do so upon the ground that it erred in its conclusion that females having the qualifications named above were entitled to vote. On the contrary Commissioner Irvine who spoke for the court in that part of his opinion found on page 607 in which he speaks of the qualifications of voters having a right to vote at a school district election seems to recognize a distinction between the qualification of the two classes of voters. True there was more than one point upon which a distinction might be predicated, consequently his remark just referred to might have reference to a point of distinction other than the one that females might vote at one election and not at the other. Hence this statement might not throw very much light upon the question. There is nothing, however in the opinion to indicate that he did not agree with the conclusion of the three district judges..

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., July 19, 1898.

S. A. Leach, Esq., Tecumseh, Neb.

My Dear Sir: Answering your favor of July 16th, you are advised that because you have removed from the village of Cook to Tecumseh does not necessarily cause you to lose your residence in the former place. The question of residence is largely one of intention. If you removed from Cook to Tecumseh solely for the purpose of residing there while you are holding the office of county clerk, and intend to return to Cook at the expiration of your term of office then you do not lose your residence in the village of Cook. If, however, at the time you left the

latter vilage, you had no intention of returning thereto then you would be no longer a resident of that place. From the foregoing, I think you will be able to determine whether or not you have lost your residence at Cook. My opinion is that you did not.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 20, 1898.

H. H. Mauck, Esq., County Attorney, Nelson, Neb.

My Dear Sir: We are in receipt of your favor of July 19th, in which you make inquiry as to the right of a school district to vote taxes at a special meeting where there was a failure to vote the same at the regular annual meeting, no annual meeting being held. We are considerably in doubt as to the right of the people of the district to now call a special meeting for that purpose and vote a tax. The right to vote taxes is specially conferred on the people of a district by section 11, subdivision 2, chapter 79 of the statutes of 1897, but the power to vote the same is limited at least by implication to any annual meeting. On the other hand it would seem to be unjust and contrary to the intention of the law to say that the schools should be closed for a year because of the failure of the people in the district to meet on a certain specified date. I believe the court would sustain a levy made at a special meeting in the absence of any provision denying the people of the district such power. I think the court would look with favor on such action rather than to strictly construe a statute in view of the results. Rather

than close the schools we would advise that a special meeting be held and the taxes be voted.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 20, 1898.

A. R. Eikenbary, Esq., County Treasurer, Plattsmouth, Neb.

My Dear Sir: Answering your favor of July 18th, you are advised that sec. 17 of the war revenue law provides that state, county, town, or other municipal corporations in the exercise of functions strictly belonging to them in their ordinary governmental taxing or municipal capacity shall be exempt from the stamp taxes imposed by that act. It further provides that certificates of indebtedness issued by the officers of any state, county, town or municipal corporation shall be exempt from the stamp taxes required thereby. We think this section is broad enough to exempt checks drawn by county treasurers in their official capacity when drawn for official purposes.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Aug. 8, 1898.

J. G. Thompson, Esq., County Attorney, Alma, Neb.

My Dear Sir: Answering your favor of August 5th, you are respectfully advised that the Attorney General has given it as his opinion that where there is no jail in the county it is then the duty of the county board to pro-

vide a place in which prisoners can be kept. If no place is provided by the board, and the sheriff guards the prisoners in his own (the sheriff's) house, then he is entitled to a reasonable compensation for the use of the same in addition to the statutory allowance for the guard and board. It was his opinion that if the sheriff secured a room eleswhere in which he kept the prisoners the county would be required to pay reasonable compensation therefor. If the sheriff saw fit to guard the prisoners in his own home he would be entitled to reasonable compensation for its use. I believe this answers your inquiries.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Aug. 8, 1898.

A. Norman, Esq., County Attorney, Ord, Neb.

My Dear Sir: In reply to yours of July 21st, in which you propound certain questions, permit me to say:

1. An acknowledgement which is attached to a real estate mortgage or a deed is a certificate within the meaning of the revenue law and should be stamped as required by that law.

2. The notation by the county clerk on the outside of the instrument which has been recorded is not, in my opinion, such a certificate as requires a stamp under the revenue law.

3. Wherever mortgages, deeds or other instruments have attached thereto a certificate of acknowledgement and have been recorded since July 1st, the clerk should as far as possible have the proper person procure and place a stamp thereon.

It is a mistake to suppose that the certificate of acknowledgement attached to a deed or mortgage is any part of the deed or mortgage. The deed or mortgage is entirely valid without such certificate. The purpose of the acknowledgment and the certificate thereof is to entitle the instrument to be recorded.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Aug. 8, 1898.

Frank E. Smith, Esq., Belvidere, Neb.

My Dear Sir: We are in receipt of your favor of August 2d addressed to the Attorney General. Article 6, chapter 77 of the Compiled Statutes of 1897 makes it the duty of the school district board after a judgment has been rendered against the school district to levy and collect a sufficient amount of money to discharge said judgment. It may be that the amount of taxes thus levied will exceed 25 mills, but it is the duty of the board to levy and collect the amount irrespective of that fact. We do not think it is sufficient for the board to merely levy a tax sufficient in amount to pay off and discharge the judgment if all the taxes were paid. If some of the taxes are unpaid or uncollectible, then the board must levy an additional amount. The statute not only makes it your duty to levy but also to collect. In the case mentioned you must either collect the tax levied or levy an additional amount. We do not think there is any way under the law by which you could legally issue a warrant against the district to pay this judgment. We know of no statute which authorizes the issuance of a warrant for that purpose. After the claim has been reduced to judgment the statute contemplates that you shall levy and collect a tax to pay it. We might suggest that if the owner of the

judgment cannot be found so as to assign the same, his attorney who has power to collect and receipt for the payment of the judgment might assign it to a purchaser. If he has authority to do one he has authority to do the other.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Aug. 10, 1898.

C. W. Hagensick, Esq., O'Neill, Neb.

My Dear Sir: Answering your favor of August 9th, you are respectfully advised that the superintendent of Public Instruction of this state has ruled that in cities of the second class and in all school districts where a portion of the school board is elected each year there is no such thing properly speaking as a new board or an old board. It is a continuing body and has a right to select a teacher at any time for the ensuing year. Under this ruling what you denominate as the old school board would have the right to hire a teacher for the coming year.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Aug. 12, 1898.

A. J. Shaffer, Esq., County Attorney, Holdrege, Neb.

My Dear Sir: Answering you favor of August 11th, you are respectfully advised that this office has given an opinion that in a case such as the one to which you refer the county board has a right to allow the bills and pay

them as far as possible out of the fund raised for that purpose. The law of 1895 was unconstitutional and parties could not have been compelled to pay any tax levied thereunder. But those who paid the same voluntarily cannot insist on its being refunded to them. It was paid to the county treasurer for a specific purpose and we do not think the county board has any right to use it for any other purpose so long as there are claims outstanding to meet which this tax was levied.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Aug. 15, 1898.

J. B. Morgan, Esq., Trenton, Neb.

My Dear Sir: Your favor of August 15th addressed to the Attorney General has been duly received at this office. The chapter of our statute which provides for the election of a county attorney does not expressly provide that he shall be a practicing attorney duly admitted to the bar, but the chapter of our statute defining the powers and duties of an attorney at law does provide that no person shall be permitted to appear for another in a court of record and prosecute or defend an action unless such person shall have been duly admitted to practice law in the manner provided in the statute. Reading these two chapters together we are of the opinion that a person is not eligible to the office of county attorney unless he is a duly admitted attorney. We do not find where our Supreme court has ever passed upon this precise question, but we believe that such would be their holding. Our Supreme Court has in a number of cases decided that unless a candidate is eligible to the office on the day of elec-

tion he cannot thereafter qualify and hold the office. It would follow that unless you were admitted to the bar before the day of election you could not thereafter be admitted so as to make you eligible to hold the office. No session of the examining committee will be held so that you could take the examination before the day of election. We regret very much that you cannot take the examination so as to be admitted before the election in order that you might retain the position on the ticket to which you have been nominated by both parties.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Aug. 18, 1898.

Hon. John F. Cornell, Auditor of Public Accounts.

My Dear Sir: We are in receipt of your favor in which you request the opinion of this office upon the following points:

1. Is it legal for a township treasurer to retain his fees for collecting state taxes and pay to the county treasurer the amount collected less the amount of his fees?

2. Is it legal for a county treasurer to retain his fees for collecting state taxes and pay to the state treasurer the amount collected less the amount of his fees?

We have given these matters considerable attention and aided by the decisions of our court, you are respectfully advised as follows:

First, as to town treasurer: Under the law of this state the township treasurer is a town officer and not a county officer. Section 57, chapter 18, Compiled Statutes of 1897 provides that the compensation of town officers

shall be deemed a town charge. From this it would seem to follow that if a township treasurer is required to pay over to the county treasurer all moneys received by such township treasurer and then have his salary allowed and a warrant issued for the same, it would follow that his claim for salary must be allowed and paid by the town board. There is no provision of our statute, however, under which the town board could allow the claim of the town treasurer for salary, nor is there any fund created against which they could draw to pay him for such services. Section 59 of the same chapter provides as follows: "The following town officers shall be entitled to compensation as follows: Town treasurer three per centum of the amount collected by him as taxes, except on school taxes he shall receive one per cent." This plainly states that he shall be entitled to three per cent of the amount collected by him. It does not provide that he shall be paid an amount equal to three per cent of the amount collected, but plainly states that three per cent of the amount collected by him shall be his compensation. That means that every time he collects one dollar of taxes except school taxes, he shall be entitled to retain and appropriate to his own use three per cent thereof. In ordinary business transactions an agreement between two parties in terms exactly similar to this statute would undoubtedly be construed as giving the collector the right to retain his collection fee and account for the balance. I know of no reason why the same rule of interpretation should not be placed upon this statute. Our Supreme Court has passed upon a similar statute which decision will be referred to later in this opinion, and I think they have settled beyond question the interpretation of this section to be as herein indicated. The conclusion we have come to is that the township treasurer should retain his fee, charging the same against each fund so collected by him

and pay over the balance to the county treasurer. He is not required to pay over the entire amount to the treasurer and then ask the county board to give him a general fund warrant for his compensation. I do not think the county board has any authority in the statute for drawing such a warrant. If he is not entitled to retain his fees then under section 57 of this chapter, the town is required to pay him for his services.

As applied to county treasurers I think the same conclusion must be reached. Section 20, chapter 28, entitled "Fees," provides the fees which the county treasurer shall receive for his services. Section 42 of the same chapter provides that except in counties having over 25,000 inhabitants, the county treasurer shall pay into the treasurer of the county all fees in excess of $2,000. If the county treasurer is not entitled to deduct from the taxes as collected the fees mentioned in section 20 of this chapter, then there never would be a time when he would have such an excess of fees in his possession, and he would never be required to pay the same into the treasury. If he is required to turn the money over to the county, and then have the county board order a warrant drawn in his favor for the amount of such fees, then before section 42, chapter 28 could have any bearing the county board must allow his fees in excess of $2,000 and draw a warrant in his favor for the amount, and after the treasurer had collected the warrant he would be required to turn back into the treasury such excess. This you can see would be a foolish requirement, and if the legislature had intended that he should turn all the money over to the county and have a warrant drawn in his favor for the amount of his compensation, they would have said that no warrant would be drawn in favor of any county treasurer for more than $2,000 per annum. But the fact that they inserted the provision that the county treasurer should pay

into the treasury all fees in excess of $2,000 shows that they contemplated that he should take out his fees as the same were earned, and then if at the end of the year the total amount thus retained by him exceeded $2,000, he should then turn such excess into the treasury. Further than this section 20 of this same chapter provides that the treasurer shall be paid in the same pro rata from the respective funds, etc. If the treasurer is required to turn this money all over to the county and be paid by a warrant drawn by the county board, or be paid by your office after he turns over all state moneys, then as many different warrants must be drawn for his compensation as there are separate and distinct funds for which he has collected taxes. The Supreme Court of this state in the case of State ex rel Pearson vs. Cornell, used this language:

"The conclusion is irresistible that all public moneys collected by the county treasurer for each fiscal year and on behalf of the State and each of its subdivisions, except educational funds, must be added together, for the purpose of determining the compensation of the officer, and that he is entitled to ten per cent upon the first $3,000 of such aggregate sum, four per cent on the next $2,000, and two per cent on the residue, the commission to be charged pro rata to the various funds."

We respectfully call attention to the last few words in this quotation. From that it is plain one fund cannot be required to pay for collecting taxes which go into another fund. The general fund cannot be required to bear the expense of collecting the taxes which go into the school fund. If it is to be charged pro rata to the various funds, then each fund must stand the expense of its own collection. You will further notice that the language used is: "The commision to be charged pro rata." They did not say that the commission was to be paid out of each fund pro rata, but that the commissions

are to be charged pro rata to the various funds. To my mind that carries the idea that the officer is to deduct from the several funds the legal fee for collecting that fund, but when you are determining the total amount of fees to which he is entitled then all the funds except educational funds must be added together.

I know of no way by which your office could pay county treasurers out of the several funds. You have no authority for drawing a warrant in favor of the county treasurer, except on the general fund. This decision of the Supreme Court clearly indicates that the school fund, university fund, general fund and every other fund for which the treasurer makes collections must bear its own share of this expense. This conclusion is also sustained by the decision of our Supreme Court in the case of the State ex rel Grable v. Roderick, 25 Neb. 629. The Pearson case you are familiar with and may be found in the 75 N. W. Rep. Page 25. I think anyone who will read these two decisions from our Supreme Court will come to the same conclusion as that arrived at by us.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., Aug. 18, 1898.

Hon. Samuel Rinaker, County Attorney, Beatrice, Neb.

My Dear Sir: We acknowledge the receipt of your favor of August 13th in which you ask the opinion of this office touching certain provisions of the law governing township organization. It is impossible to reconcile all the provisions found in our statute pertaining to township organization. Many of these provisions must be given a most liberal interpretation, while others must

be strictly construed in order to make them harmonious. We have examined the statute relative to the particular matters mentioned in your inquiry and the conclusion we have come to might be summed up in the following:

Lincoln, Neb., Aug. 18, 1898.

Hon. Samuel Rinaker, County Attorney, Beatrice, Neb.

My Dear Sir: We acknowledge the receipt of your favor of August 13th in which you ask the opinion of this office touching certain provisions of the law governing township organization. It is impossible to reconcile all the provisions found in our statute pertaining to township organization. Many of these provisions must be given a most liberal interpretation, while others must be strictly construed in order to make them harmonious. We have examined the statute relative to the particular matters mentioned in your inquiry and the conclusion we have come to might be summed up in the following:

1. The township collector has no authority to issue a distress warrant. This power is not expressly conferred upon him by statute and it being a statutory remedy and cannot be exercised by any officer except when specially named in the statute.

2. It is his duty to call upon the person taxed and demand payment of the taxes charged to him whether such person live within the limits of a village or not. The word, town, as used in section 95 includes all the territory within the subdivision for which he is elected town treasurer.

The view you take of the several provisions of this statute agrees with our own. But one question remains, and that is the authority of the county treasurer to issue a distress warrant where the town collector has not called upon the delinquent tax payer and demanded the pay-

ment of the taxes. We do not think this is a condition precedent. While the law makes it the duty of the town collector to call upon the tax payer and demand payment of the taxes it also makes it the duty of the tax payer to walk up to the Captain's office and pay his taxes. These taxes become due and delinquent by operation of law and not by the act of the town collector in hunting up the tax payer and making a demand for the taxes. If the tax payer fails to pay his taxes before they become due and delinquent he cannot defeat a distress warrant by pleading that the town collector ought to have run after him and insisted on his paying his taxes.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 13, 1898.

F. J. Birss, Esq., County Clerk, Hebron, Neb.

My Dear Sir: Answering your recent favor in which you enclose a copy of what might be regarded as a resignation of C. H. Willard as a member of the county board. You are respectfully advised that in the opinion of this office this does not amount to a resignation. It is addressed to the county treasurer of Thayer county, who, under the law, is not authorized to receive or accept the resignation of this officer. It can have no more effect, being addressed to the county treasurer than though it had been addressed to this office or to a private individual of your county. If Mr. Willard has removed from your county, so that he is no longer a resident thereof, then there is a vacancy on the county board which could be filled as pro-

vided by the statute. But we do not think that this letter to the county treasurer amounts to a resignation.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 13, 1898.

E. M. Talbot, Esq., County Treasurer, Thedford, Neb.

My Dear Sir: Answering your favor of October 3d, you are respectfully advised that under the law of this state as understood by this office, county warrants which have been registered should be paid in the order of their registration as soon as there is money in that fund on which they are drawn with which to pay the same, irrespective of the year in which they were issued, and without regard to the year for which the taxes have been collected. In other words, all the warrants drawn on the general fund in 1897 and registered should be paid before any warrants drawn in 1898 are paid. This is true even though the 1897 taxes are not paid and the 1898 taxes are paid. The warrants are claims against the county and not against the taxes for any particular year, hence, all the 1897 registered warrants should be taken up before any 1898 warrants are paid.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 13, 1898.

F. D. Hunker, Esq., County Attorney, West Point, Neb.

My Dear Sir: Answering your favor of October 3d you are respectfully advised that in the opinion of this office, a revenue stamp ought to be attached to the certificate of nomination filed by each political party, but that the stamp is not necessary on each certificate of appointment of judges and clerks of election as made by the county judge. It is barely possible that a revenue stamp would not be required for the former, but as a matter of precaution I think it had better be affixed.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 27, 1898.

Ambrose C. Epperson, Esq., County Attorney, Clay Center, Neb.

My Dear Sir: Answering your favor of October 19th, permit us to say that we are unable to understand how there can be twenty-five voters living within the incorporated city of Sutton and at the same time reside within School Creek township, if the city of Sutton is partly located in School Creek township and partly in Sutton township. If these voters reside within the limits of School Creek township the assessor elected for that township is the one for which they should vote, but we do not understand how it is possible for the city of Sutton to have an assessor by itself and yet a part of the people live within the limits of the city and at the same time reside in School Creek township. It must be that part of what was formerly School Creek township and which is

now within the limits of the city of Sutton is no longer a part of School Creek township.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 27, 1898.

Hon. Nels O. Alberts, Saronville, Neb.

My Dear Sir: Answering your favor of the 19th, you are respectfully advised that all candidates regularly nominated for township assessor should be certified to the county clerk and the county clerk should print their names upon the official ballots. This applies whether the assessor be nominated in a township in which there is no incorporated city or town or whether nominated in an incorporated city. An assessor is in no sense a city officer. His duties are the same when he is elected in a city as they are when he is elected in a country precinct. The electors in that township or city elect him, and under the provisions of the statute his name should be upon the official ballot.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 28, 1898.

Hon. John B. Raper, County Attorney, Pawnee City, Neb.

My Dear Sir: Referring to the provisions of chapter 77, article 3 and 4, relative to the purchase of lands at tax sale by the county commissioners, we have given this mat-

ter consideration and are of the opinion that where county commissioners purchase property for the benefit of the county at tax sale the county stands in exactly the same position as a private individual would stand if he were to buy property at tax sale. If such purchaser permits the land to be sold for taxes subsequently assessed the lien of the last purchaser in point of time is first in priority or validity. Under section 1, article 4 of this chapter it is expressly provided that counties may foreclose such liens, but you will notice that it is therein provided that the same shall be done in all respects as far as practicable in the same manner and like effect as though the same were a mortgage executed by the owner of the real estate. That means that if the property is sold for taxes for a subsequent year then the holder of the last certificate acquires a lien superior to the lien of the county. We think the county would be still authorized to proceed to enforce its lien before the expiration of the two years within which the owner shall have to redeem from the last sale, but on such foreclosure the lien of the county would be established subject to the lien of the holder of the tax sale certificate who last purchased the land at tax sale.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Nov. 1, 1898.

H. J. Welty, Esq., County Attorney, Pender, Neb.

My Dear Sir: Answering your favor of recent date in which you make inquiry as to the effect where a subsequent county clerk attaches to the tax list his certificate or warrant authorizing the county treasurer to proceed to

collect the taxes. It appears from your letter that in certain years the county clerk neglected to attach his warrant to the tax list for those years. The subsequent county clerk acting under the instructions of the county board attached his warrant to said tax list. The question is, does that authorize the county treasurer to issue distress warrants for the unpaid taxes on those lists? We are of the opinion that it does. The fact that the county clerk failed to attach the proper certificate at the time the tax list was delivered to the treasurer ought not deprive the county of the right to collect those taxes by distress warrant if the proper certificate is thereafter attached.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Nov. 10, 1898.

E. M. Hamer, Esq., Hastings, Neb.

My Dear Sir: Answering your favor of November 9th, you are respectfully advised that in the opinion of this office, that provision of our statute which authorizes a board of education to appoint three competent persons who shall constitute an examining committee does not forbid or prevent members of the board of education from acting on this committee. The law simply says they shall be competent persons. The fact that the superintendent also acts with them as a member of the examining committee would not, we think, invalidate the certificates issued by the examining committee.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Nov. 21, 1898.

Miss Elsie Merriam, County Superintendent, Harrison, Neb.

Dear Madam: Your favor of November 19th has just been received at this office. We have given the matter very careful examination and regret very exceedingly that we are not able to afford you more assistance. The time having elapsed within which you might appeal from the decision of the county board in disallowing your claim it now seems to be a question as to whether or not the county board should allow the claims of Prof. Gray and Prof. Phipps. We have no hesitancy in saying that the claims of these gentlemen should be allowed by your county board and paid out of this institute fund. We are satisfied that if the matter should be adjudicated in the district court their claims would be allowed and ordered paid. A mere notation upon the margin of the claims that the same were disallowed is not proper evidence of the action of the board. The county clerk is required to keep a record of the proceedings of the board and until his record shows that these claims have been disallowed there is nothing showing the action of the board. The county board should take some definite action upon the claims of these two gentlemen, and if they are disallowed an appeal should be taken by them to the district court. We cannot believe that the county board will arbitrarily reject these claims and compel you to pay the same. Certainly they would not be justified in so doing, and you are at liberty to present this communication to the county board if you so desire so as to advise them of the opinion of this office. This communication may not reach you in time to answer your purpose, but it is sent on the first mail after receiving your favor of the 19th.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 9, 1898.

A. F. Dyer, Esq., Hayes Center, Neb.

My Dear Sir: Answering your recent favor you are respectfully advised that this office on other occasions has given it as its opinion that a person not regularly admitted to the bar of this state prior to the day of election is ineligible to the office of county attorney, and could not qualify even though he were to receive a majority of the votes cast.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 9, 1898.

H. E. Gapen, Esq., County Attorney, Sidney, Neb.

My Dear Sir: Answering your favor of September 7th, you are respectfully advised that it is the opinion of the board of irrigation as well as of this office that the compensation of the under assistants in water districts is limited to $300 from the entire district irrespective of the number of counties that may be included therein.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 9, 1898.

Hon. J. V. Wolfe, Commissioner Public Lands and Buildings.

My Dear Sir: We return the correspondence relative to the confinement of Susan Reeder in the Industrial School at Geneva.

You are respectfully advised that, in our opinion, it is not for the superintendent of the Reform School to question the residence of this party. Our statute does not provide that she must have been a resident of the state any particular time, or in fact, that she be a resident of the state at all. Section 5, chapter 75, provides that when any girl of sane mind under the age of eighteen years, shall in any court in this state, be found guilty of any crime, except murder or manslaughter, or is incorrigible, she may be committed to the Reform School. It would hardly be contended if she were convicted of a crime that she could not be sent to the Reform School because not a resident of this state. In fact the Reform School is not limited to those who may be residents of this state, but any one who is convicted before a court of record in accordance with section 5, of this chapter may be sentenced to this school. Further than this if the warrant of commitment made by the committing magistrate is in due form it is the duty of the superintendent of this school to receive the person described in said warrant. If the warrant was not legally issued, then he probably would be justified in refusing to accept her, but if the papers are regular I do not think he can refuse to receive the girl on the ground that her parents reside outside of this state. I know of no statute in this state which would authorize any county judge, or superintendent of the Reform School, after this girl had been convicted of being incorrigible, to pronounce as a sentence upon her that she must leave the state and be exiled to Missouri.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 16, 1898.

George W.King, Esq., County Judge, Gering, Neb.

Dear Sir: Answering your favor of the 13th, you are respectfully advised that, in our opinion, it is very doubtful if you have the right on habeas corpus proceedings to reduce this bail. You do not state in your letter whether the party was bound over by the county court or by a justice of the peace. But we infer the latter. In either event after the party has been bound over to the district court the latter court then has jurisdiction of the case and any application to reduce the amount of the bond should be addressed to the district court or a judge thereof.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 23, 1898.

Charles W. Meeker, Esq., County Attorney, Imperial, Neb.

My Dear Sir: Your letter of the 22d asking for the opinion of this office with respect to the question whether or not a county would have to put up an undertaking to secure an attachment under the circumstances therein stated, has been duly received. Without making a thorough examination of the question I would say that I would consider it the safer course to give the bond. We have recently had ocasion to examine the question as to whether the state would be required to give the bond to secure an attachment, but after a very exhaustive examination of the authorities we found but two cases that held that the state did not have to give the bond. These cases put the decision upon the theory that the state because of its sovereign capacity could not be required to furnish

bond. The cases, however, are of doubtful authority here, and as before stated I think it the safer course to give the bond.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Sept. 29, 1898.

T. F. Mahoney, Esq., Greeley, Neb.

My Dear Sir: Your letter of recent date has been duly received and has been very much delayed in answering. We found it necessary to examine the original records in the office of the Secretary of State to ascertain if possible just what the legislature did and what is meant. The fact is that this bill as certified to by the presiding officers of both houses and signed by the Governor is exactly as printed in the statutes. It is very ambiguous and there has evidently been a blunder in preparing it. I am not of the opinion that the county board is authorized to issue general fund warrants to pay these road certificates. I think the intention of the statute is that these certificates shall be paid out of the road district fund and not out of the general fund. If there is not sufficient money in the road district fund to pay such certificates, then they are to be registered and like county warrants to be paid in the order in which they are registered. I do not believe the certificates bear interest for the reason there is no positive provision of the statute which makes them interest bearing obligations. They are not county warrants, but are merely certificates entitling the holder to a stated amount when there is sufficient money in the road district fund with which to pay it. In the absence of a statute providing that they shall bear interest I do

not think the holder is entitled to any interest thereon.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 29, 1898.

Jules Schoenheit, Esq., County Attorney, Falls City, Neb.

My Dear Sir: Answering your favor of September 27th, addressed to the Attorney General, you are respectfully advised that under the law of this state and the decisions of our Supreme Court a bastardy proceeding is a civil action. It is not governed by the rules governing criminal prosecutions. It therefore, does not become the duty of the county attorney to appear for the prosecutrix and attend the trial of the case unless it be a proceeding brought in the name of the county to protect it from liability for the support of the illegitimate offspring. You are no doubt familiar with the provisions of our statute under In that event I think it would be the duty of the county attorney to attend to the prosecution without extra compensation. But where the suit is brought by the injured female, then it is not the duty of the county attorney by virtue of his office to attend to the prosecution.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Sept. 30, 1898.

Hon. J. V. Wolfe, Commissioner of Public Lands and Buildings.

My Dear Sir: Under the provisions of schedule "A"

of the War Revenue law of 1898 it is provided that bonds given to insure the due execution and performance of contracts must have attached thereto a revenue stamp of fifty cents. This would apply to bonds given to the state by those parties who are awarded contracts for furnishing supplies to the several state institutions. Each bond given by the successful bidders should have attached thereto a stamp in the sum of fifty cents.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED. P. SMITH,
Deputy.

Lincoln, Neb., Oct. 4, 1898.

J. R. Swain, Esq., County Attorney, Greeley, Neb.

My Dear Sir: Section 82, chapter 78 of our statute entitled Roads, is very ambiguous and it is evident that the legislature made a blunder when they enacted it. We had this section under consideration in other matters and the conclusion we came to is that these road certificates must be presented to the county treasurer and if there be not money in this particular fund with which to pay the certificate then it must be registered the same as county warrants until there is money in this fund. We do not think that under the statute these certificates should be paid by a warrant on the general fund.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 5, 1898.

Calvin Keller, Esq., Wausa, Neb.

My Dear Sir: Your letter of the 26th of September

addressed to the board of health has been referred to this office for reply. You are advised that, in the opinion of this office, a physician under the circumstances you mention would not be required to file or record his certificate in the adjoining county. If the certificate is filed in the county where the physician resides it is sufficient. The statute requires that it be filed in the county where the physician resides or where he intends to practice. It does not require that it be filed in both such counties. Therefore, I think it sufficient if the certificate be filed in the county where the physician resides if he be a resident of this state.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Oct. 13, 1898.

J. J. Carlin, Esq., Bassett, Neb.

My Dear Sir: Answering your recent favor in which you make inquiry as to the right of the free silver republicans of your county to nominate a legislative ticket, your attention is respectfully called to section 6 of the Act of the last legislature known as the ballot law. This section provides that where fifty people meet together and hold a county convention they may make party nominations for county office and they there take a name as a political party. They can then file a certificate of nomination containing this name and it shall be entitled to have their candidates names appear upon the ticket under that party title. Of course two years ago and one year ago the free silver republicans had their place on the state ticket and in all of the counties of the state their tickets were in the field. They held their state convention again

this year, have filed their certificate of nomination with the Secretary of State and in all of the official ballots sent out by the Secretary of State this year that party will be again placed upon the ticket. We think the people of your county of that party have a right to meet in convention, and if fifty of them meet in such convention, they unquestionably have the right to make nominations, certify the same to the county clerk and have their names appear on the official ballot.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Nov. 21, 1898.

G. W. Norris, Esq., Beaver Crossing, Neb.

My Dear Sir: Answering your favor of November 19th you are respectfully advised that in our opinion a woman cannot hold the office of town treasurer under the law of this state. A person must be a qualified elector in order to hold that office. If at the last election a woman received a majority of the votes for that office it is the same as though no election had been held. The person now holding the office would continue to hold the same until a successor duly qualified to hold the office is chosen. The one now in office would be justified, we think, in refusing to surrender the office to any party who received the majority of the votes at the last election if such party is a woman, and therefore not qualified to hold the office.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Nov. 21, 1898.

B. F. Eberhart, Esq., County Attorney, Benkleman, Neb.

My Dear Sir: In the opinion given by the Attorney General touching the right of the county judge to compensation for appointing judges and clerks of election, he did not limit it to those counties where such county judge received the limit of fees allowed by our statute. His opinion was that there was no provision of statute which entitled any county judge to fees for this service. It was probably an oversight of the legislature, but there seems to be no provision made for paying this officer for performing this duty. The conclusion of the Attorney General was that the county judge must perform the services without compensation. A copy of the opinion is herewith enclosed.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Nov. 23, 1898.

Mr. E. Lowe, St. Edwards, Neb.

Dear Sir: Your letter of a recent date was duly received, but owing to pressure of public business was unable to give it attention before. Sections 3880 and 3881, Compiled Statutes of 1897, require that all products of petroleum, gasoline being one, shall be inspected and approved before being offered for sale for illuminating purposes. Gasoline will not stand the test provided for by these sections and therefore must be rejected for use for illuminating purposes. Section 3888 provides a fine for the use for illuminating purposes of any oils mentioned before the same have been legally inspected and branded approved. So far as these sections are concerned, the use, in any form or manner of gasoline for

illuminating purposes would subject you to a fine under the section last quoted. Section 3890, however, provides cases in which gasoline may be used for illuminating purposes. The manner in which you propose to use it does not come within those cases, and therefore to use it as you propose to do would be a violation, in my opinion, of section 3888, and would subject you to the fine there provided for. In my opinion the law now under consideration was drawn before the lamps which you are handling was thought of, or at least before it became known as a means of utilizing gasoline for illuminating purposes. The legislature would, no doubt, upon it being brought to their attention, change the law so as to provide for the use of gasoline in the manner in which you propose to use it in your lamp.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Nov. 23, 1898.

C. E. Callendar, Esq., Thedford, Neb.

My Dear Sir: I have yours of the 11th in which you ask whether or not a ballot having a cross in the circle at the head of the ticket should be counted as a vote for the candidate for county attorney, whose name is written in pencil, there being no cross in the space opposite his name. My opinion is that such a ballot should be counted as a vote for him. The law says that an elector may vote a straight party ticket by making his cross in this circle (meaning the circle at the head of the ticket), which shall be considered a vote for every candidate on said party ticket. Comp. Stat., page 580.

Very truly yours,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., Nov. 28, 1898.

Grant Guthrie, Esq., County Attorney, Harrison, Neb.

My Dear Sir: Answering your favor of the 23rd, you are respectfully advised that, in our opinion, the board of county commissioners have a right to allow the claim of the county superintendent for services rendered as an instructor in the county institute where she is paid a per diem and the services were actually rendered. We are of the opinion that the time spent by the county superintendent in conducting the institute is time spent in performing the duties of the office and should be paid for the same as services rendered by the county superintendent in visiting schools and holding examinations of teachers.

Very truly yours,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., Feb. 17, 1897.

Hon. John F. Cornell, Auditor of Public Accounts.

Dear Sir: I have your letter of recent date asking my opinion as to whether or not it is your duty, as Auditor of Public Accounts, to issue warrants on the following state of facts: Certain persons were sworn in as members of the House of Representatives and served as such twenty-two (22) days. Their seats were contested, and they were ousted therefrom. Fifteen days' pay had been given to them by the state, and thus seven days were left unpaid for. After they were ousted they presented to you in due form vouchers for the pay for said seven days and demanded warrants thereon.

The question thus raised is identical in principle with the one presented to the New York Court of Appeals in

Dolan vs. The Mayor, 68 N. Y., 275.

In that case the plaintiff was unlawfully excluded from office by one Keating, who entered upon the office December 31st, 1872, and continued to occupy the same until March 1st, 1874, when he was ousted therefrom and the plaintiff again came into possession. Keating received the salary attached to the office from the time of his intrusion to December 1st, 1873, and hence there were at the time he was ousted three months for which he had received no pay. The successful contestant sued the city for the salary attached to the office during the entire time that Keating occupied it. The court held that he was not entitled to recover from the city for the time for which Keating had been paid, but that he was entitled to recover for the last three months during which Keating served and for which Keating had not been paid. Thus was presented and decided the exact question involved in this case, that is to say: Where the city or state, as in this case, has not paid the de facto officer for the time during which he filled the office, to whom does the pay for that period belong, the de facto officer or the de jure officer. Here you ask me whether or not the pay attached to the office of member of the legislature, (which pay still remains in the hands of the state) belongs to the officer de facto who has been ousted or to the officer de jure.

In McVeny vs. The Mayor, 80 N. Y., 185, it is said:

"A municipal corporation whose disbursing officer has once made payment of the compensation given by law to an officer to one actually in the office discharging his duties with color of title and with his right thereto not determined against him by a competent tribunal is protected from a second payment, but when there has been such an adjudication any amount of compensation for services rendered not paid to the intruder in the office is due and payable to the one adjudged to be the officer de

jure and may be recovered by the latter of the municipality."

The Supreme Court of Michigan in the Auditor, etc. vs. Wayne County, 20 Mich., 176, held that no claim could be enforced by the officer de jure against a county for salary paid to an officer de facto. Judge Cooley dissented and Judge Christiancy put his concurrence upon the ground that the disbursing officer of the county did not know at the time the salary was paid that the person to whom it was paid was not the officer de jure, and further said, that if the disbursing officer did know, he (Judge Christiancy) would have concurred with Judge Cooley. You knew at the time that the persons demanded the warrants that they were not members de jure of the legislature.

In the State vs. Milme, 36 Neb., 301, the Supreme Court of this state, after stating certain facts drawn from a decision of the Supreme Court of Kansas, quotes with approval this language: "The remedy of the county clerk de jure in such a case is an action against the county clerk de facto." This proposition is, in my opinion, supported by the great weight of authority. That being so, it would be unreasonable to say that the ousted members have a right to collect from the state, as their own, money which does not belong to them, but which belongs to the seated, or de jure, members, and which, in a proper action, the law would give to the members dejure.

My opinion is that the ousted members are not entitled to the warrants demanded and that it is your duty under the law to refuse their demand.

Yours very truly,
C. J. SMYTH,
Attorney General.

Lincoln, Neb., April 21, 1898.

Hon. John F. Cornell, Auditor of Public Accounts, Lincoln, Neb.

Dear Sir: I have your favor of recent date in which you ask for the opinion of this office with respect to the legality of three claims, denominated by you as claims "A," "B," and "C." I will consider claim "B" first.

This is a certificate issued by the Board of Regents of the State University, directing the Auditor to draw his warrant for $15.60 in favor of A. E. Sheldon for clerical services rendered in the Chancellor's office for the month of March, 1898. In connection with this claim you state that Mr. Sheldon was during the period covered by the claim, Clerk of the State Printing Board at a salary of $600.00 per annum and that he has been paid his salary as such clerk. The secretary of the Printing Board, Hon. W. F. Porter, informs me that Mr. Sheldon was first employed by the Board at a salary of $1,000.00 per year, with the understanding that he was to devote his entire working time to the services of the Board, but the Board finding that it did not need all that time agreed with him to reluce his salary from $1,000.00 to $600.00 in consideration of the Board permitting him to engage in such other employment as he might be able to procure, provided he did the work of the Board which, it was estimated, would take about one-half of his working time. In view of this agreement Mr. Sheldon sought and procured employment at the State University during the time when not engaged by the Printing Board. Under these circumstances I think his claim for services rendered in the Chancellor's office is legal.

Claim "C" is the voucher of E. W. Crane for $51.50. One item therein stated is $47.00 for filing 470 saws for the use of the carpenters on the State buildings at the exposition grounds. In this connection you state that Mr.

Crane during the time he was employed in filing the 470 saws, was in the employ of the state exposition commission as time keeper at a salary of $60.00 per month. I think this claim is legal. The commission has full power to fix the salaries of its time keeper or time keepers. It may raise that salary or reduce it. If it determine to raise it, it may at the same time add additional duties to those already imposed upon the person whose salary is raised.

In the conclusions reached with respect to claim "B" and "C" there is no conflict between them and the one reached in the opinion rendered to Hon. Otto Mutz under date of March 8th, 1898, for the following reasons:

In that case we were asked to state whether or not, where the legislature has fixed the salary of a person employed by the state to do a certain line of work, it was competent for the Board or officer employing such person to increase his salary by direct or indirect means. We said it was not, and we still adhere to that opinion. If the law permitted the compensation of the employee to be thus increased the will of the legislature in fixing his salary at a given point could be and probably would be completely disregarded in many instances.

The rule however is different where the legislature empowers an officer of a board to fix the salary at such a point as the officer or board may think proper. In the one case the legislature has fixed the salary and left no person or set of persons any discretion with respect to the matter. In such a case the command of the legislature must be obeyed. In the other case however the legislature has committed the fixing of the salary to the discretion of the officer or board as the case may be and hence what the officer or board in his or its discretion does is legal. The boards employing Mr. Sheldon and Mr. Crane were clothed by the legislature with that discretion.

Claim "A" is a certificate issued by the Board of Regents of the State University, directing the Auditor to draw his warrant for $120 in favor of Honorable Frank Irvine, one of the commissioners of the Supreme Court, for services as lecturer in the law college during the session of 1897 and 1898. Judge Irvine may be said to be in many respects a member of the Supreme Court of this state, and for the purpose of the matter now in hand may be treated as being a member of the court in all respects. That court is charged with the duty of interpreting the laws of the state. Judge Irvine is making out and filing the voucher upon which claim "A" was drawn, did so on the theory that he was entitled under the law to receive from the state the amount of money called for in the voucher. That being so, and he being a member of the Supreme Court, it would be to say the least indelicate in me even to examine the claim for the purpose of determining whether or not it was legal. For this reason I request to be excused from passing upon the legality of claim "A."

Respectfully submitted,

C. J. SMYTH,

Attorney General.

Lincoln, Neb., April 22, 1898.

Jesse L. Root, Plattsmouth, Neb.

Dear Sir: Your letter of the 18th addressed to the Attorney General was duly received at this office. Under the statute to which you refer it is the opinion of this office that a vacancy in the board may be filled by a vote of a majority of those who are then members of the board. For example, if there were five members of the board, three would constitute a majority of the entire membership of the board then existing and that number would be sufficient to fill the vacancy. To hold otherwise would be to say that two members of the board could prevent

the filling of this vacancy. It is true, the statutes to which you refer requires that in order to fill this vacancy the person must receive the vote of "a majority of all the members of the board," but the words, "all members of the board" must have reference to the number of members then on the board, and not of which the board may be composed. If there are but five members on the board as now constituted, then if he receives the vote of three, he has, we think, received the vote of a majority of all the members of the board.

Yours very truly,
C. J. SMYTH,
Attorney General.
ED P. SMITH,
Deputy.

Lincoln, Neb., July 15, 1898.

Hon. H. Whitmore, County Attorney, Franklin, Neb.

My Dear Sir: Your letter of July 14th was duly received by me. I take the following extract therefrom:

"The sheriff in such county—meaning Franklin county—having claimed and received from his county $2.00 per day for guarding a prisoner, and also pay for his meals, is he, the sheriff, also entitled to pay for house room in his residence while guarding the prisoner there?

On one side of the question it is claimed that he is entitled to such pay in addition to his $2.00 per day for guarding, and on the other hand it is claimed that the difference in the per diem fee between guarding a prisoner where there is no jail, and in guarding a prisoner in a jail, is intended to cover room rent, lights and fuel."

It appears from your statement of the argument in support of one side of the question embodied in the above quotation, that the claim is made on the theory that there

is a statutory provision fixing the fee which a sheriff shall receive for guarding a prisoner where there is no jail. If there is such a provision I have not been able to find it. The only provision which I have been able to find with respect to the matter is found in section 5, chapter 28, of the Compiled Statutes of 1897, and is as follows: "For guarding prisoners when it is actually necessary $2.00 per day to be paid by the county." If there is any other provision on this subject I will be glad to have you point it out to me. Upon the theory that there is not, it is my opinion that the sheriff is entitled to receive $2.00 per day for guarding prisoners when it is necessary to employ a guard for that purpose. This allowance is made, as I understand it, only when it is necessary to employ extra guards, because of the insecure condition of the jail provided by the county, and is distinct from the fee allowed the sheriff as jailer. If the sheriff can guard the prisoner or prisoners as the case may be without employing extra guards, then his fee would be $1.50 a day, but where he must employ extra guards it is my opinion that he would be entitled to $2.00 per day for each guard so employed.

I am also of the opinion that where the county does not provide a jail of its own it is liable for the reasonable rental value of the room or building which it may use or which the sheriff may find it necessary to use in keeping and guarding his prisoner or prisoners, and it does not make any difference whether the room or house used by him belongs to him or somebody else, the rule is the same. Hence, in the case under consideration, if the county has not provided any place as a jail and the sheriff selects a temporary place in which to keep and guard his prisoner he is entitled to receive the reasonable value of the use of the place so used. And next, if it is necessary, for him to hire a guard because of the unsafe condition of the jail

or place of detainment he is entitled to $2.00 per day for each guard so employed. The case of James vs. Lincoln County, 5 Neb., 38, will throw considerable light upon the question which I have just attempted to answer. Hoping this is clear to you, we remain,

Yours very truly,

C. J. SMYTH,

Attorney General.

SCHEDULE "B"—STATE CASES.—CRIMINAL.

No. 8414.

George Morgan, v The State. — Murder. Douglas County. June 3, 1897. Affirmed. 51 Neb. 672.

No. 8508.

Henry Bolln, v The State. — Embezzlement. Douglas County. May 18, 1897. Affirmed. 51 Neb. 581.

No. 8657.

George Washington Davis, v The State. — Murder. LancasterCounty. April 21, 1897. Affirmed. 51 Neb. 301.

No. 8660.

Joel C. Williams, v The State. — Fraudulent Banking. Gage County. May 18, 1897. Reversed. 51 Neb. 630.

No. 8991.

William Henry, v The State. — Murder. Gage County. April 21, 1897. Reversed. 51 Neb. 149.

No. 9002.

George Kelly, v The State. — Larceny. Burt County. May 18, 1897. Reversed. 51 Neb. 572.

No. 9022.

Quiller Beck, v The State. — Burglary. Otoe County. March 17, 1897. Reversed. 51 Neb. 106.

No. 9032.

Edwin E. Catron, v The State. — Cattle stealing. Sheridan County. October 6, 1897. Affirmed. 52 Neb. 389.

No. 8932.

Charles Myers, v The State. — Rape. Seward County. May 5, 1897. Reversed. 51 Neb. 517.

No. 9052.

James Williams, Charles Wharton and J. Stone, v The State. — Robbery. Douglas County. June 3, 1897. Reversed. 51 Neb. 711.

No. 9091.

Warren Rema, v The State. — Cattle stealing. Keith County. October 6, 1897. Affirmed. 52 Neb. 375.

No. 9144.

John Rooney, v The State. — Grand larceny. Douglas County. May 18, 1897. Reversed. 51 Neb. 576.

No. 9165.

William C. Ream, v The State. — Receiving stolen property. Cuming County. December 9, 1897. Affirmed. 52 Neb. 727.

No. 9229.

Charles Ferguson, v The State. — Burglary. Otoe County. October 20, 1897. Affirmed. 52 Neb. 432.

No. 9364.

Herman F. Granger, v The State. — Cattle stealing. Sheridan County. October 6, 1897. Affirmed. 52 Neb. 352.

No. 9234.

Benjamin D. Mills, v The State. — Embezzlement. Harlan County. January 3, 1898. Affirmed. 53 Neb. 263.

No. 9250.

E. S. Whitney, v The State. — Embezzlement. Harlan County. January 3, 1898. Affirmed. 53 Neb. 287.

No. 9347.

Joseph S. Bartley, v The State. — Embezzlement. Douglas County. January 3, 1898. Affirmed. 53 Neb. 310. June 9, 1898. Affirmed on rehearing. 55 Neb. 294.

No. 9363.

D. H. Hurlburt, v The State. — Cattle stealing. Scotts Bluff County. October 20, 1897. Affirmed. 52 Neb. 428.

No. 9383.

Edward Johnson, v The State. — Burglary. Douglas County. December 21, 1897. Affirmed 53 Neb. 103.

No. 9379.

Martin Kazda, v The State. — Selling liquor without license. Johnson County. November 4, 1897. Reversed. 52 Neb. 499.

No. 9438.

Ryman Fisher, v The State. — Larceny. Sheridan County. November 4, 1897. Reversed. 52 Neb. 531.

No. 9469.

P. C. Durfee, v The State. — Selling liquor without license. Furnas County. December 22, 1897. Affirmed. 53 Neb. 214.

No. 9525.

Frank Maxfield, v The State. — Rape. Hamilton County. March 3, 1898. Reversed. 54 Neb. 44.

No. 9574.

James Carrall and Frank Brown v The State. — Burglary. York County. January 19, 1898. Affirmed. 53 Neb. 431.

No. 9508.

Edward Lorenz v The State. — Murder. Red Willow County. January 19, 1898. Reversed. Attorney General refused to file brief. 53 Neb. 463.

No. 9697.

Eugene Moore, v The State. — Embezzlement. Lancaster County. February 17, 1898. Reversed and dismissed. 53 Neb. 831.

No. 9618.

Philip Bergeron, v The State. — Burglary. Adams County. February 17, 1898. Reversed. 53 Neb. 752.

No. 9662.

Joseph H. Stickel, v The State. — Fraudulent Banking. Thayer County. February 1, 1898. Affirmed. No opinion.

No. 9663.

Hugo E. Nelson, v The State. — Selling liquor without a license. Burt County. February 17, 1898. Reversed. 53 Neb. 790.

No. 9729.

Hugo E. Nelson, v The State. — Selling liquor without a license. Burt County, March 1, 1898. Reversed. No opinion.

No. 9717.

C. H. Browning, v The State. — Burglary. Gage County. March 17, 1898. Reversed. 54 Neb. 203.

No. 9720.

William E. Barker, v The State. — Perjury. Dawes County. March 3, 1898. Reversed. 54 Neb. 53.

No. 9805.

Jonas Reynolds, v The State. — Receiving stolen goods. Hall County. February 17, 1898. Reversed. 53 Neb. 761.

No. 9825.

William R. Myers, v The State. — Rape. Lincoln County. March 17, 1898. Affirmed. 54 Neb. 297.

No. 9827.

Sam Davis,
v
The State.

Larceny as bailee. Otoe County. March 17, 1898. Reversed. 54 Neb. 177.

No. 9852.

Frank Peyton and
Emmett Peyton,
v
The State.

Robbery. Douglas County. March 17, 1898. Reversed. 54 Neb. 188.

No. 9867.

James Latimer,
v
The State.

Robbery. Stanton County. June 23, 1898. Reversed. 55 Neb. 609. 76 N. W. 207.

No. 9919.

Joseph Bush and
James Lovejoy
v
The State.

Burglary. Fillmore County. May 19, 1898. Reversed. 55 Neb. 195.

No. 9929.

Clarence Lackey,
v
The State.

Robbery. Hitchcock Co. October 5, 1898. Affirmed. 76 N. W. 561. 56 Neb. —

No. 9945.

John W. Argabright,
v
The State

Murder. Nemaha County. October 20, 1898. Reversed. 76 N. W. 876. 56 Neb. —

No. 9883.

Charles McVey,
v
The State.

Larceny from the person. Douglas County. September 23, 1898. Affirmed. 76 N. W. 438. 55 Neb. 777.

No. 9998.

Dick Hilligas, v The State. — Cattle stealing. Merrick County. June 23, 1898. Reversed. 75 N. W. 1110. 55 Neb. 586.

No. 10127.

A. L. Morgan, v The State. — Obtaining money under false pretenses. Cherry Co. November 17, 1898. Reversed. 77 N. W. 64. 56 Neb. —

No. 10130.

Henry Oerter, v The State. — Keeping gambling devices. Douglas County. December 8, 1898. Reversed. 77 N. W. 367. 56 Neb. —

No. 10177.

Otto Snider, v The State. — Obstructing railroad. Butler County. October 5, 1898. Reversed. 76 N. W. 574. 56 Neb. —

No. 10183.

Charles W. Cunningham, v The State. — Burglary. Dodge County. November 17, 1898. Affirmed. 77 N. W. 60. 56 Neb. —

No. 10221.

Clarence Chezem, v The State. — Larceny from the person. Adams County. November 3, 1898. Affirmed. 76 N. W. 1056. 56 Neb. —

No. 10254.

Earnest D. Smith, v The State. — Selling liquor without a license. Clay County. November 16, 1898. Affirmed. No opinion.

No. 10273.

John Pisar, Jr., v The State. — Selling liquor without a license. Gage County. October 20, 1898. Affirmed. 76 N. W. 869. 56 Neb. —

No. 10320.

Charles C. Stevens, v The State. — Cattle stealing. Sheridan County. November 3, 1898. Affirmed. 76 N. W. 1055. 56 Neb. —

CRIMINAL CASES PENDING.

No. 10356.

Edman George, v The State. — Receiving stolen cattle. Cherry County.

No. 10412.

William McVey, v The State. — Shooting with intent to wound. Douglas County.

No. 10472.

Frederick D. Reynolds, v The State. — Bigamy. Hayes County.

No. 10476.

Coote Mulloy, v The State. — Assault and battery. Box Butte County.

No. 10483.

George C. Bailey, v The State.	Statutory rape. Douglas County.

SCHEDULE C.—CRIMINAL CASES IN LOWER COURTS.

The State of Nebraska, v Eugene Moore.	County Court, Lancaster county. Embezzlement. Defendant recognized to appear before the District Court.
The State of Nebraska, v Eugene Moore.	District Court, Lancaster County. Information for embezzlement. Defendant entered plea of guilty. Motion in arrest of judgment overruled and defendant sentenced to eight years in the penitentiary.
The State of Nebraska, v Joseph S. Bartley.	County Court, Lancaster County. Embezzlement. Defendant recognized to appear before the District Court.
The State of Nebraska, v Joseph S. Bartley.	District Court, Lancaster County. Information for embezzlement as State Treasurer. Nolle prosequi entered by State.

The State of Nebraska, v Joseph S. Bartley.	District Court Douglas County. Information for embezzlement as State Treasurer of $201,884.05. Defendant found guilty and sentenced to twenty years in the penitentiary.

SCHEDULE D.—INJUNCTION CASES.

Winter, v Redfield.	District court, Douglas county. Injunction restraining County Clerk from delivering ballots to recount commission. Injunction denied.
Thayer, v Trimble.	District court, Lancaster county. Injunction restraining County Clerk from delivering ballots to recount commission. Action dismisssed by plaintiff.
Clifford P. Fall, v H. A. Given, et al.	District court, Gage county. Injunction restraining defendants from taking possession of Institution for Feeble Minded Youth.
Greenleaf W. Simpson, v Union Stock Yards Co., and C. J. Smyth, Attorney General.	Circuit Court United States District of Nebraska. Injunction restraining enforcement of the act of 1897 regulating stock yards. Action pending.

State Journal Company, v John F. Cornell, et al.	District Court, Lancaster County, Injunction restraining State Printing Board. Judgment for plaintiff.
Solomon Hoffine, v Jacob Cohn, et al.	District Court, Otoe county. Injunction restraining defendants from taking possession of certain lands the title of which was derived from the state. Injunction dissolved. Appealed to the supreme court. Appeal dismissed.
Nebraska Telephone Co., v John F. Cornell, et al.	District Court, Lancaster county. Injunction restraining Board of Transportation from enforcing act of 1897. Injunction dissolved.
Pacific Express Co., v John F. Cornell, et al.	District Court, Lancaster county. Injunction restraining Board of Transportation from enforcing act of 1897. Injunction dissolved.
Niagara Fire Insurance Co., v John F. Cornell, et al.	Circuit Court United States, District of Nebraska. Injunction restraining the enforcement of the act of 1897. Pending.

SCHEDULE E.—CIVIL CASES.

No. 9020.

In re State Treasurer's settlement.	Supreme Court.	Opinion. 51 Neb. 116.

State of Nebraska, v Eugene Moore, et al.	District Court, Lancaster county. Action to recover shortage as State Auditor of $23,218.75. Judgment for sureties and against defendant Moore. Appealed to supreme court.
The State of Nebraska, v Joseph S. Bartley, et al.	District Court, Douglas county. Action on bond of State Treasurer for shortage of $555,790.75. Judgment for defendants. Appealed to Supreme Court. Reversed.
Thomas P. Kennard. v The State of Nebraska.	District Court of Lancaster county. Action on claim of $13,521.99 against the state. Judgment for plaintiff. Appealed to Supreme Court. Reversed.
The State of Nebraska, v First National Bank of Alma, et al.	District Court of Harlan county. Action on bond as state depository to recover $40,612.90. Pending.

The State of Nebraska, v MerchantsBank of Lincoln, et al.	District Court, Lancaster county. Action on bond as state depository to recover $8731.85. First bond. Pending.
The State of Nebraska, v MerchantsBank of Lincoln, et al.	District Court, Lancaster county. Action on bond as state depository to recover $8731.85. Second bond. Pending.
Missouri Pacific Ry. Co., v John F. Cornell, et al.	District Court of Lancaster county. Appeal from the Board of Transportation. To be dismissed by appellant.
The State of Nebraska, v Citizens National Bank of Grand Island, et al.	District Court, Hall county. Action to subject money in hands of receiver as the money of Bartley to the payment of state's claim against Bartley. Judgment for plaintiff$8943.08
The State of Nebraska, v First National Bank of Orleans, et al.	Action commenced in District Court, Harlan county. Removed to U. S. Circuit Court. The action was to recover on bond as state depository. Judgment for plaintiff, $15,825.
The State of Nebraska, v Joseph S. Bartley, et al.	District Court, Lancaster county. Action to recover shortage as State Treasurer on first term bond of $335,878.08. Pending.

The State of Nebraska, v OmahaNationalBank, et al.	District Court, Douglas county. Action to recover $201,884.05, wrongfully received from Bartley on a void state warrant. Pending.
John B. Meserve, State Treasurer, v Kent K. Hayden, Receiver.	U. S. Circuit Court of Appeals. Pending on appeal.
The State of Nebraska, v John W. McDonald, Receiver, Capital National Bank.	Circuit Court U. S. District Nebraska. Action to recover $236,361.83, lost by the failure of the Capital National Bank. Pending.
The State of Nebraska, v Society of the Home for the Friendless.	District Court, Lancaster county. Action in ejectment to recover possession of Home for the Friendless. Judgment for plaintiff, appealed to Supreme Court.
The State of Nebraska, v Home Insurance Co., of New York.	District Court, Lancaster county. Action to recover fees due the state for services performed by Auditor Moore. Pending.
The State of Nebraska, v John T. Mallalieu, et al.	District Court, Buffalo county. Action to recover $4458.38 shortage as Superintendent of the Kearney Industrial School. Pending.

The State of Nebraska, v William Ebright, et al.	District Court, Otoe county. Action to recover $1087.15 shortage as Superintendent Institute for the Blind, Nebraska City. Pending.
The State of Nebraska, v P. A. Shurtz, et al.	Justice Court, Madison county. Action in replevin to recover certain property of the state. Judgment for plaintiff.

No. 10021.

The State of Nebraska, plaintiff in error. v Eugene Moore, et al., defendants in error.	Supreme Court, from Lancaster county. September 23, 1898, affirmed. 76 N.W. 474.

No. 10117.

The State of Nebraska, plaintiff in error. v Joseph S. Bartley, et al, defendants in error.	Supreme Court from Douglas county. December 8, 1898. Reversed. 77 N. W. 438.
Frank Irvine, v John F. Cornell.	District Court, Lancaster county. Appeal from decision of Auditor in rejecting a claim. Judgment for appellant, appealed to Supreme Court.

No. 10232.

John F. Cornell, v Frank Irvine.	Supreme Court, from Lancaster county. November 17, 1898. Affirmed. 77 N. W. 114.

No. 10322.

The State of Nebraska, plaintiff in error. v Thomas P. Kennard, defendant in error.	Supreme Court from Lancaster county, October 5, 1898. Reversed. 76 N. W. 545.

The State of Nebraska, v Buffalo County National Bank, et al,	District Court, Buffalo county, et al. Action to recover on a bond as state depository. Judgment for state $5777.68. Appealed to Supreme Court.

The State of Nebraska, v L. F. Hilton, et al.	District Court of Lancaster county. Action to recover shortage as State Inspector of Oils. Judgment for plaintiff, $6941.72. Appealed to Supreme Court.

No. 10461.

Richard Blaco, v The State of Nebraska, et al.	Supreme Court. Error to the District Court of Lancaster county, to reverse judgment in State v Hilton. Pending.

No. 10426.

J. C. Goodell, v The State of Nebraska, et al, and A. J. Gallentine, v The State of Nebraska,et al.	Supreme Court. Error to the District Court of Buffalo county to reverse the judgment in State v BuffaloCounty National Bank, et al. Pending.
The State of Nebraska, v Charles W. Mosher, et al.	District Court, Lancaster county. Action to recover shortage of $3527.90 as treasurer of Relief Commission. Pending.
The State of Nebraska, v Joseph Garneau.	District Court, Douglas county. Action to recover balance due state as Commissioner to World's Columbian Exposition.

SCHEDULE F.—MANDAMUS CASES.

No. 8948.

The State, ex rel, Woodruff–Dunlap Printing Co., v Bartley, et al.	March 3, 1897. Writ denied. 50 Neb. 874.

No. 8997.

The State, ex rel, Edward A. Cary, v Eugene Moore.	February 3, 1897. Writ allowed. 50 Neb. 526.

No. 9216.

The State, ex rel, Woodruff-Dunlap Printing Co. v John F. Cornell, et al.	Error to District Court, Lancaster county. June 15, 1897. Reversed. 52 Neb. 25.

No. 9609.

The State, ex rel, Mrs. C. S. Jones, v Mrs. F. M. Williams.	Error to District Court, Lancaster county, March 3, 1898. Affirmed. 54 Neb. 154.

No. 9723.

The State, ex rel, Society Home for the Friendless, v John F. Cornell, et al.	Judgment. March 3, 1898. 54 Neb. 158.

No. 9811.

The State, ex rel, Douglas county, v John F. Cornell.	March 4, 1898. Writ allowed. 54 Neb. 72.

No. 9812.

The State, ex rel, Douglas county, v John F. Cornell.	February 2, 1898. Writ allowed. 53 Neb. 556.

No. 9874.

The State, ex rel, John A. Pearson, v John F. Cornell.	April 21, 1898. Writ denied. 54 Neb. 647.

No. 9959.

The State ex rel, Patterson, v John F. Wenzl.	Error to District Court. Pawnee County. May 19, 1898. Affirmed. 55 Neb. 210.

No. 10007.

The State, ex rel, Victor Rosewater, v Silas A. Holcomb.	Nov. 17, 1898. Writ denied, 77 N. W. 1117.

No. 10008.

The State, ex rel, Society Home for the Friendless, v John F. Cornell.	September 23, 1898. Writ allowed. 76 N. W. 459.

SCHEDULE G.—MANDAMUS CASES LOWER COURTS.

State, ex rel, Woodruff-Dunlap Printing Co., v State Printing Board.	District Court, Lancaster county. Judgment in favor of respondents, appealed to the Supreme Court.
State, ex rel, Thomas C. Munger, v William F. Porter, et al.	District Court, Lancaster county. Quo warranto, dismissed.
State ex rel, Mrs. C. S. Jones, v Mrs. F. M. Williams.	District Court, Lancaster county. Judgment for respondent. Appealed to Supreme Court.
State, ex rel, Otto W. Helbig, v Silas A. Holcomb, et al.	District Court, Lancaster county.
State, ex rel, H. E. Dawes, v J. A. Gillispie.	District Court, Douglas county. Pending.

SCHEDULE H.—HABEAS CORPUS CASES.

No. 8999.

In re, William McVey.	February 3, 1897. Prisoner discharged. 50 Neb. 481.

William P. Trester, v George W. Leidigh, Warden.	District Court, Lancaster county. Writ denied. Appealed to Supreme Court.

No. 9493.

William P. Trester, v George W. Leidigh, Warden.	Error to District Court, Lancaster county. December 21, 1897. Affirmed. 53 Neb. 148.

No. 9932.

The State, ex rel, William C. Ream, v George W. Leidigh, Warden.	April 21, 1898. Writ denied. 54 Neb. 667.

In re, Herman Granger,	District Court, Lancaster county. Writ denied. Appealed to Supreme Court.

No. 10142.

In re, Herman Granger,	Error to District Court, LancasterCo. Oct. 5, 1898. Affirmed. 76 N.W. 588. 56 Neb.—

No. 10067.

In re, John Fanton, } Sept. 23,1898. Writ denied. 76 N. W. 447. 55 Neb. 703.

SCHEDULE I.—BANK AND LOAN ASSOCIATION RECEIVERS.

The appointment of Receivers has been secured in the following cases:

The State of Nebraska, v Citizen's Bank of Fullerton. } District Court, Nance county. February 1, 1897. E. D. Goold, Receiver.

The State of Nebraska, v Exchange Bank of Atkinson. } District Court, Holt county. May 10, 1897. S. B. Howard, Receiver.

The State of Nebraska, v State Bank of Havelock. } District Court, Lancaster county. May 26, 1897. Fred M. Shepard, Receiver.

The State of Nebraska, v Merchants Bank of Lincoln	District Court, Lancaster county. ——— 1897. S. A. D. Shilling, Receiver.
The State of Nebraska, v Midway City Building & Loan Association.	DistrictCourt, Buffalo county. John A. Miller, Receiver.
The State of Nebraska, v Holstein State Bank.	District Court, Adams county. November 30, 1897. Thomas Mullady, Receiver.
The State of Nebraska, v Bohemian Loan and Building Association.	District Court, Douglas county. November 29, 1898. Albert Hoffman, Receiver.
The State of Nebraska, v State Bank of Crawford.	District Court, Dawes county. John H. Jones, Receiver.
The State of Nebraska, v Chas. A. Sweet & Co., Palmyra.	District Court, Otoe county. Alex McIntyre, Receiver.

SCHEDULE J.—IN THE SUPREME COURT OF THE UNITED STATES.

MAXIMUM FREIGHT RATE CASES.

No. 49.

Constantine J. Smyth, et al. v Oliver Ames, et al.	Appeal from Circuit Cou U. S. March 7, 1898. Affirm ed. 18 Sup. Ct. Rep. 41 169 U. S. 466. Modificatio of decree on motion of Atto ney General, May 31, 189 18 Sup. Ct. Rep. 888.

No. 50.

Smyth, et al, v Smith, et al,	Same.

No. 51.

Smyth, et al, v Higginson, et al	Same.

SCHEDULE K.—APPROPRIATIONS FOR OFFICE OF ATTORNEY GENERAL.

1895 Appropriations.

1897 SALARY.—Attorney General.

Jan. 7, By Balance,.....		$461.12
Mar. 30, To C. J. Smyth, salary,.....	$461.12	
	$461.12	$461.12

SALARY.—Deputy Attorney General.

Jan. 7, By Balance,.....		$415.00
Mar. 30, To Ed P. Smith, salary,.....	$415.00	
	$415.00	$415.00

SALARY.—Stenographer.

Jan. 7, By Balance,.....		$230.57
Mar. 30, To Geo. F. Corcoran, salary, ..	$230.57	
	$230.57	$230.57

STATIONERY AND POSTAGE.

Jan. 7, By Balance,.....		$100.25
May 4, To Postage and Stationery,.....	$100.25	
	$100.25	$100.25

TELEGRAPH AND EXPRESS.

Jan. 7, By Balance,		$64.14
July 9, To telegraph, express and telephone expense,	$16.29	
July 9, To Balance,	47.85	
	$64.14	$64.14
July 9, By Balance,		$47.85

OFFICE EXPENSES, REPAIRS AND SAFE.

Jan. 7, By Balance,		$3.70
July 10, To Expenses,	$2.75	
July 10, To Balance,	.95	
	$3.70	$3.70
July 10, By Balance,		$0.95

PRINTING BRIEFS SUPREME COURT.

Jan. 7, By Balance,	$3.45

1897 Appropriations.

SALARY.—Attorney General.

April 15, By Appropriation,		$4000.00
Nov. 30, '98, To C. J. Smyth, salary,	$3000.00	
Dec. 1, To Balance,	1000.00	
	$4000.00	$4000.00
Dec. 1, By Balance,		$1000.00

SALARY.—Deputy Attorney General.

April 15, By Appropriation, ...		$3600.00
Nov. 30, '98, To Ed P. Smith, salary,	$3000.00	
Dec. 1, To Balance, ...	600.00	
	$3600.00	$3600.00
Dec. 1, By Balance, ...		$600.00

SALARY.—Stenographer.

April 15, By Appropriation, ...		$2000.00
Nov. 30, '98, To Geo. F. Corcoran, salary,	$1666.66	
Dec. 1, To Balance, ...	333.34	
	$2000.00	$2000.00
Dec. 1, By Balance, ...		$333.34

DEFICIENCY.

April 15, By Appropriation.....		$200.00
June 26, To printing briefs, &c., ...	$198.19	
Dec. 1, To Balance, ...	1.81	
	$200.00	$200.00
Dec. 1, By Balance, ...		$1.81

STATIONERY AND POSTAGE.

April 15, By Appropriation, ...		$400.00
Nov. 30, '98, To Stationery and Postage,	$307.40	
Dec. 1, To Balance, ...	92.60	
	$400.00	$400.00
Dec. 1, By Balance, ...		$92.60

COURT AND OFFICERS FEES.

April 15, By Appropriation,.....		$125.00
Nov. 30, '98, To fees paid,.....	$ 80.60	
Dec. 1, To Balance,.....	44.40	
	$125.00	$125.00
Dec. 1, By Balance,.....		$44.40

OFFICE EXPENSES.

April 15, By Appropriation,..... ...		$100.00
Nov. 30, '98, To office expenses,.....	$ 99.35	
Dec. 1, To Balance,.....	.65	
	$100.00	$100.00
Dec. 1, By Balance,.....		$0.65

PRINTING BRIEFS.

April 15, By Appropriation,.....		$700.00
Nov. 30, '98, To printing briefs,.....	$633.00	
Dec. 1, To Balance,.....	67.00	
	$700.00	$700.00
Dec. 1, By Balance,.....		$67.00

TELEGRAPH AND EXPRESS.

April 15, By Appropriation, ...		$100.00
Nov.30,'98, To Telegraph and Express,	$ 90.70	
Dec. 1, To Balance, ...	9.30	
	$100.00	$100.00
Dec. 1, By Balance, ...		$9.30

FURNITURE AND REPAIRS.

April 15, By Appropriation,		$300.00
Nov. 30, '98, To Furniture and Repairs,	$197.30	
Dec. 1, To Balance,	102.70	
	$300.00	$300.00
Dec. 1, By Balance,		$102.70

TRAVELING EXPENSES.

April 15, By Appropriation,		$600.00
Nov. 30, '98, To Traveling Expenses,	$493.05	
Dec. 1, To Balance,	106.95	
	$600.00	$600.00
Dec. 1, By Balance,		$106.95

APPROPRIATION FOR USE IN PROSECUTIONS BY THE ATTORNEY GENERAL IN CASES CIVIL AND CRIMINAL.

(Disbursed by order of the Governor.)

April 15, By Appropriation, ...		$5000.00
Nov. 30, '98, To Expenses Paid, ...	$4310.28	
Dec. 1, To Balance, ...	689.72	
	$5000.00	$5000.00
Dec. 1, By Balance, ...		$689.72

NOTE.—For detailed statement of expenditures of all above appropriations see semi-annual statements on file in the office of the Governor.

ACCOUNT OF MONEY RECEIVED BY ATTORNEY GENERAL.

Jan. 7, '97, To Cash from A.S.Churchill, Ex-Attorney General, ...	$ 30.90	
May 10, '98, applied on expenses to Washington, see voucher No. B 21281..		$ 30.90
July, '98, received from Clerk Supreme Court, Washington, D. C., excess fees, ...	273.93	
Aug. 26, paid State Treasurer, Receipt No. 9421.....		273.93
Aug. 20, Cash received from S.B.Howard, Receiver, Exchange Bank of Atkinson, account deposit of J. S. Bartley, ...	6762.30	
Aug. 26, paid State Treasurer, Receipt No. 9422, ...		6762.30
	$7067.13	$7067.13

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TABLE OF CASES.